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THE LAW

OF

MINES, QUARRIES, AND MINERALS

BY

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BARRISTER-AT-LAW

FOURTH EDITION

BY THE AUTHOR

ASSISTED BY

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PREFACE

TO THE FOURTH EDITION

THE chapters which appeared in the previous editions, and were numbered XXI, XXII, and XXIII in the Third Edition, and which dealt with Local Courts, Rights and Customs (principally in Cornwall and Devonshire, Gloucestershire and Derbyshire), are omitted from the present. In the Third Edition they occupied 105 pages of space. There has been no reported decision as to any of these matters for nearly thirty years. There has been no reference to any of them in any recent Act of Parliament, except the Companies (Consolidation) Act, 1908, which contains provisions adapting Acts thereby repealed to companies within the jurisdiction of the Stannaries. It would be too much to say that the omitted matters have ceased to have practical interest. But it is hardly too much to say that for many years they have had more interest for the archæologist than the lawyer. In omitting them from the present edition the Author has been able, without materially increasing its bulk, to deal *inter alia*, and he hopes sufficiently, with the recent decisions on the meaning of the word "minerals," and the meaning of the words "mines of minerals" in the Railways and Waterworks Clauses Acts; with the recent decisions on the Law of Support; with the provisions of the Finance (1909–10) Act, 1910, as to Duties on Mines; and with the Coal Mines Act, 1911.

The Author has been throughout assisted by his friend and former pupil, Mr. Lloyd-Greame. But he wishes to add, that so far as the chapter, which is now numbered XXI[1] (and which includes the Coal Mines Act, 1911) consists of new matter, it is principally Mr. Lloyd-Greame's work.

R. F. MacS.

May, 1912.

[1] It was thought desirable to produce this chapter in separate form, which was done in March last.

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[**The pages of the text in which any part of a statute is given verbatim are marked with an asterisk.**]

ADDENDA.

Page 9, *n.* [5]—Before the words "These definitions" insert "and the Coal Mines (Minimum Wage) Act, 1912."

Page 156, *line* 3—The position of an executor is different. An executor has power under the Land Tr. Act, 1897, to sell the surface apart from the minerals; and to do so without obtaining the sanction of the Court.[1a] Position of executor.

[1a] Cavendish and Arnold's Contract, 1912, W. N. 83.

Page 157, *after line* 11—The statutory power of sale in a mortgage executed after January 1, 1912, however, includes (i) a power to impose or reserve any restriction or reservation with respect to mines and minerals, or for the more beneficial working thereof; and (ii) a power to sell the mortgaged property, or any mines and minerals apart from the surface— Convg. Act, 1911.

(*a*) with or without a grant or reservation of easements, rights, and privileges;

(*b*) with or without an exception or reservation of mines and minerals, or with or without a grant or reservation of powers of working, wayleaves, and other powers, easements, rights, and privileges for or connected with mining purposes.[1]

And an application to the Court under the Trustee Acts[2] is not required.[3]

[1] Conveyancing Act, 1911, s. 4 (1). [2] See *ante*, p. 155, and *supra*.
[3] Conveyancing Act, 1911, s. 4 (4).

Page 199, *line* 12—

SECT. 3A.—MORTGAGOR AND MORTGAGEE.

With a view to the grant of a lease authorised under section 18 of the Conveyancing Act, 1881, as varied by the Conveyancing Act, 1911, or by agreement, a mortgagor or mortgagee in possession may accept a surrender of a lease, with or without an exception of mines and minerals, or in respect of mines and minerals; and, on a surrender of a part only, the rent may be apportioned. And on a surrender of a part only the original lease may be varied.[1] These powers are, however, subject to specified provisoes, including a provision that the lease is to take effect in possession or within one month after the date of the surrender, and that the rent is not to be diminished.[2] Convg. Act, 1911.

[1] Conveyancing Act, 1911, s. 3 (1) (2) (3). [2] S. 3 (5).

M.M.

Page 337, *n.* [7], *add*—Indeed, as regards Bell *v.* Dudley, it may be that the principle of the Butterley case (as to which see *post*, p. 344) applies. See (by reference to Add.), *post*, p. 344, n. [1a].

Page 343, *line* 3 *from foot*—Before the word "impossible" insert "difficult, if not."

Page 344, *line* 3—Before the word "which" insert "(and, where it is possible to produce it, in older instruments [1a])."

Page 344, *in notes add*—[1a] Evidence was produced in Bell *v.* Dudley, 1895, 1 Ch. (see pp. 187, 188), a case under an Inclosure Act passed in 1784. The mine there in question was thirty feet thick. It was proved that articles of pottery were found in the old workings; which, according to pottery experts, had been manufactured at least 200 years before the action. Knowledge, at that date, of the inevitable result of the workings was inferred.

Page 344, *n.* [2], *add*—and see Locker-Lampson *v.* Staveley Coal Co., 25 T. L. R. 136.

Page 344, *line* 8—After the word "authorised" add, "So an appeal may be made to the science and practice of mining as understood and followed at the date when the title was severed for the purpose of ascertaining the true construction of the instrument of severance." [2a]

Page 344, *in notes add*—[2a] See Butterley Co. *v.* New Hucknall Co., etc., 1910, A. C. 386, *per* Lord Macnaghten, citing Dixon *v.* White, 8 A. C. at p. 838. See also Smart *v.* Morton, 5 E. & B. at pp. 37, 38, 48.

Page 387, *line* 33—Besides the difference already mentioned,[6a] there is a further difference between section 81 of the Rail. Cl. Act and section 25 of the Wat. Cl. Act. The latter section includes not only "minerals which cannot be obtained by reason of making and maintaining the works," but also those which cannot be obtained "by reason of apprehended injury from the working thereof." [6b]

S. 81 of Rail. Cl. Act; s. 25 of Wat. Cl. Act.

[6a] See *supra*.

[6b] See Holliday *v.* Wakefield, 1891, A.C. at p. 86, *per* Lord Bramwell.

Page 561, *after line* 16 *insert*—And where mines are demised reserving a dead rent and also a royalty; and there have been no mineral workings, the lessee is not in occupation of the mines, and is not entitled to deduct income tax from the dead rent paid to the lessor; but the lessor is assessable under s. 60, Sched. A. No. II. r. 6, in respect of profits from lands not in his actual possession.[4a]

Dead rent—no working.

[4a] Hill *v.* Gregory, 1912, W. N. 70.

Page 563, *n.* [12], *add*—The rental value does not include income tax deducted and paid by the lessee. Such income tax is not paid as rent, and no duty is therefore payable on the amount: Beaufort *v.* Commissioners of Income Tax, *Times*, March 7, 1912.

Page 565, *n.* [6], *add*—And rent actually paid in the working year is none the less liable to duty because it represents arrears in respect of previous years: Beaufort *v.* Commissioners of Income Tax, *Times*, March 7, 1912.

Page 566, *n.* [6], *add*—, or on account of super-tax. As to the latter, see Beaufort *v.* Commissioners of Inland Revenue, *Times*, March 7, 1912.

Page 601, *for n.* [3] *substitute*—The qualifications for a surveyor are prescribed by an Order dated the 27th February, 1912, which provides that a surveyor must hold either—

(1) a certificate from the Board for Mining Examinations (*ante*, p. 590) or from an institution approved by the Secretary of State that—
  (i) he has had at least two years practical experience in the surveying of mines;
  (ii) he is competent
    (*a*) to make an accurate survey of the workings of a mine and to connect such survey with a surface survey;
    (*b*) to make accurate levellings; and
    (*c*) to plot accurately surveys and levellings;
  (iii) he has given satisfactory evidence of his sobriety and general good conduct; or

(2) a Manager's First Class Certificate of Competency endorsed by the said Board or by a Divisional Inspector of Mines to the effect that he has had at least two years practical experience in the surveying of mines.

In the case of a person who was employed in surveying mines to which the Act applies at the date of the passing of the Act, the certificate (1) may be given by the Inspector of Mines for the Division in which he was so employed at that date if application be made to him for the same not later than the 31st December, 1912.

Pages 739 *et seq.*—The text of the Coal Mines (Minimum Wage) Act, 1912, is printed on these pages.

MINES, QUARRIES, AND MINERALS.

CHAPTER I.

MEANINGS OF MINE, QUARRY, MINERALS, SOIL, AND LIKE WORDS AND EXPRESSIONS.

Sect. 1.—MINE, VEIN, SEAM, BED, STRATUM, QUARRY, COLLIERY.

(*a*) *Mine, Vein, Seam, Lode, Bed, and Stratum.*

Definitions of mine.

"Mine" is defined in Johnson's Dictionary as "a place or cavern in the earth, which contains metals or minerals:" in Webster's Dictionary as "a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging:" in Worcester's Dictionary as "a subterraneous work or excavation for obtaining metals, metallic ores, or other mineral substances, a pit, a cavern;" and in Wharton's Law Lexicon as "an excavation or cavern in the earth which yields metals or minerals."

Definitions of vein, seam, lode, bed, stratum.

"Vein" is defined in Webster's Dictionary as "a seam or layer of any substance more or less wide intersecting a rock or stratum, and not corresponding with the stratification; often limited in the language of miners to such a layer or course of metal or ore;" and in Richardson's Dictionary as "lineal tubes, which convey the blood in animals; lineal streaks in mineral or vegetable bodies." The Encyclopædia Britannica thus defines veins, lodes, and beds:—"Veins" or "lodes" are tabular or sheet-like deposits of minerals, which have been formed since the rocks by which they are surrounded. They differ therefore by their subsequent origin from beds, which . . . are of contemporaneous origin with the

enclosing rocks.[1] "Seam" is defined in Webster's Dictionary as "a thin layer or stratum; a narrow vein between two thicker ones; as a seam of coal." "Stratum" is defined in Johnson's Dictionary as "a bed; a layer;" and in Webster's as "a bed of earth or rock of any kind formed by natural causes, and consisting usually of a series of layers."

Mine and vein—resemblances and differences—primary senses.

If there are a particular number of veins within or under a piece of land, there are precisely the same number of mines occupying precisely the same areas. In this sense the primary meaning of mine is vein.[2] Consistently, however, with this, each word seems to have a distinct meaning of its own. In strictness a mine is not, it would seem, "properly so called, until it is opened. It is at best but a vein of coals before."[3] Indeed it has been laid down that a grant of "lands and mines," where some of the veins in question are open and others hidden, will only pass the open veins.[4] On the other hand, mines, where unopened mines are spoken of, mean in strictness nothing more nor less than veins or seams.[5] In fact, mine appears in its primary sense to imply openness, and vein or seam appears in its primary sense to exclude that notion.

Secondary senses.

In a secondary sense, however, mine may be said to mean a closed vein. "Although a vein be not open, but close, yet it might be termed a mine—that which is not open may be called a mine."[6] And, on the other hand, veins or seams may, in a secondary sense, be called mines.[7] A devise, before the Wills Act, of "pits and veins" in and upon certain lands, "together with the rents and profits of such pits and veins," was, for example, held only to pass pits and veins which were open at the date of the will.[8] A mine, like a vein or seam, may be

[1] See vol. xvi., p. 441 (9th edit.).

[2] See Abinger *v.* Ashton, 17 Eq. 369, *per* Jessel, M.R.; Ramsay *v.* Blair, 1 A. C. 705, *per* Lord Selborne.

[3] See Astry *v.* Ballard, 2 Mod. 193: see Colchester *v.* Kewney, L. R. 2 Ex. 257; Newton, Chambers & Co. *v.* Hall, 1907, 2 K. B., at pp. 455, 458, 459.

[4] Astry *v.* Ballard, *sup.*

[5] See Ramsay *v.* Blair, *sup. per* Lord Selborne; Glasgow *v.* Farie, 13 A. C. 687, *per* Lord Macnaghten: see also Batten Pooll *v.* Kennedy, 1907, 1 Ch. at p. 266.

[6] See Case of Mines, Plowden, 337. See also R. *v.* Foleshill, 2 A. & E. 578; Shaftesbury *v.* Wallace, 1897, 1 Ir. R. 402, 403.

[7] See Hext *v.* Gill, 7 Ch. 712, *per* Mellish, L.J.

[8] Brown *v.* Whiteway, 8 Ha. 150. The same case contains a query, whether, since the Wills Act, such a

properly so called, although it extends through the properties of a variety of owners.[1] The word mine is, however, frequently used in the secondary sense of a part of a vein. For example, that part of a vein, which is within a particular property, is in common parlance, and may with propriety be, called a mine. It is so considered for rating purposes.[2] And, of course, it is so considered for the purpose of regulating the rights and duties of its owner in respect of the other portions.[3] On the other hand, the word mine is frequently used in the secondary sense of an aggregation of veins or seams.[4] Of course the word mine is hardly ever used in the secondary sense of underground works.[5]

"Mines" may include roads in adjoining strata—Batten Pooll *v.* Kennedy.

It has been held, that the word "mines" includes not merely the actual bed in which the minerals lie, but so much of the adjoining strata as has to be removed for the purpose of working them. It therefore, it has been held, includes the roads properly made in the adjoining strata for the purpose of reaching and carrying away the minerals, and all proper alterations of such roads subsequently made for the same purpose.[6]

Remarks on Batten Pooll *v.* Kennedy.

This conclusion was founded upon *Eardley* v. *Granville*, which is subsequently referred to.[7] But it is doubtful, it is submitted, whether there is anything in that case, which justifies so wide a meaning for the word "mines." That case merely dealt with the question whether the word mine included the containing chamber.[8] And it is also doubtful, it is submitted, whether the conclusion is consistent with one of the points decided in a case which was itself discussed for another purpose, namely, *Proud* v. *Bates*.[9] In that case a mine-owner had made a road partly in a mine excepted from a lease of the land, and partly in the overlying non-mineral strata. It was held, upon the language of the lease, and in the particular circumstances, that way-leave for foreign minerals had been reserved.

devise would pass pits or veins open at the death of the testator, but there seems no reason to doubt that it would.

[1] Van Mining Co. *v.* Llanidloes, 1 Ex. D. 319.

[2] *Ib.* Cf. R. *v.* Foleshill, 2 A. & E. 598.

[3] See Ivimey *v.* Stocker, 1 Ch. 407, 408.

[4] See Spencer *v.* Scurr, 31 Beav. 334.

[5] See Bowes *v.* Ravensworth, 15 C. B. 516.

[6] Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256, 261, 267.

[7] 3 Ch. D. 826; see *post*, p. 8.

[8] See *post*, pp. 8, 91.

[9] 34 L. J. Ch. 406, cited *post*, pp. 103, 480, 481, 482.

But it was also held that, although the exception included the containing chamber, the upper part of the road was not included in the exception. If the conclusion in *Batten Pooll* v. *Kennedy* be right, it would not have been necessary in *Proud* v. *Bates* to base the right to use the upper part of the road on the language of the lease, and the particular circumstances. It is also submitted that the conclusion involves the proposition that the lessee of a mine is, *primâ facie*, entitled to carry foreign minerals through underground roads of which he is not also the lessee; a proposition which is, it is thought, not well founded.[1]

(β) *Mine and Quarry.*

Definitions of quarry.

"Quarry," as distinguished from mine, is defined in Johnson's Dictionary as "a stone mine, a place where they dig stones:" in Webster's Dictionary as "a place, cavern, or pit where stones are cut from the earth for building or other purposes, a stone pit:" and in Worcester's Dictionary as "a stone bed whence building materials are dug or cut, a stone pit." And in the definition of "mine" in Wharton's Law Lexicon it is said—"When stones only are produced, the places from which they are dug out are called quarries."[2] It has also been judicially stated, that the word "quarry" generally means a place where the material is got out in a large shape like blocks, and not where it is got in small pieces, like coal and ironstone.[3]

Derivations of mine and quarry.

In the lexicographical part of the Encyclopædia Metropolitana the word "mine" is said to be derived from the Latin *minare*, a word of the Lower Ages, signifying *ducere*, to lead, and to mean "to draw or lead, *sc.*, a way or passage underground, a subterraneous duct, course, or passage, whether in search of metals or to destroy fortifications." And in the same work the word "quarry" is said to be derived from the French *quarriere;* and it is added, "in the Latin of the Lower Ages *quadratarius* was a stone cutter, *qui marmora quadrat;* and hence *quarriere*, the place where he quadrates or cuts the stones in squares." "Quarry" is then defined to be "the

[1] See *post*, pp. 239, 240.

[2] For the definitions of "mine" in these works, see *ante*, p. 1.

[3] Jones *v.* Cwmorthen Slate Co., 5 Ex. D. 95, *per* Bramwell, L.J.

place where the stone is cut in squares; generally a stone pit." [1]

Mine generally implies underground and quarry surface working.

The true distinction between a mine and a quarry, so far at least as a lawyer is concerned, seems, speaking generally, to be best indicated in the Encyclopædia Metropolitana. It is the mode of working the article obtained, and not its chemical or geological features, which generally determines its legal character. If the article is obtained by underground workings, the place from which it is obtained is, generally speaking, a mine: if it is obtained by workings upon or above the ground, the place is, generally speaking, a quarry.

Dicta.

"The question is, whether you are working so as to remove the surface, including, perhaps, portions of the lateral surfaces, so as not to leave a roof. Mining is when you begin only on the surface, and by sinking shafts, or driving lateral drifts, you are working so that you make a pit or tunnel, leaving a roof overhead." [2] "A mine, properly speaking, is that mode of working for minerals by diving under the earth, and then working horizontally, or laterally; whereas a quarry is where the working is *sub dio*." [3] "A quarry is a work from which stone or other material is obtained by excavation from the surface only. Directly you cease to excavate from the surface, and carry on a subterranean work, it ceases to be a quarry." [4] This distinction was recognised by Lords Watson and Herschell in the House of Lords in *Glasgow* v. *Farie*.[5] However, in *Midland Railway Co.* v. *Robinson*,[6] Lord Herschell, in the House of Lords, said, "Applying oneself to the consideration of the word 'mines,' apart from the document or context in which it is found, I cannot think that its natural meaning

[1] In Jacob's Law Dictionary the word "mines" is most inaccurately defined as "quarries or places where-out anything is digged:" see Bell *v.* Wilson, 2 Dr. & Sm. 400.

[2] See Darvill *v.* Roper, 3 Drew. 299, *per* Kindersley, V.-C.

[3] See Bell *v.* Wilson, 2 Dr. & Sm. 399, *per* Kindersley, V.-C., 1 Ch. 308, *per* Turner, L.J.; Errington *v.* Met. R. Co., 19 Ch. D. 571, *per* Jessel, M.R.; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555, 560, *per* Kay, J.; Glasgow *v.* Farie, 13 A. C. 687, 688; Mid. R. Co. *v.* Robinson, 15 A. C. 35, *per* Lord Macnaghten.

[4] See Cleveland *v.* Meyrick, 16 W. R. 105, *per* Malins, V.-C.: see also Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108; Listowel *v.* Gibbings, 9 *ib.* 233; Tucker *v.* Linger, 21 Ch. D. 36; Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 558.

[5] 13 A. C. 677, 683, 684.

[6] 15 A. C. 30.

imports such beds or strata of minerals only as are ordinarily got by underground working."

"Mine" primarily means underground excavation.

Indeed, according to the statement in the Encyclopædia Metropolitana, the primary meaning of "mine" was an underground excavation. And it was by successive transitions in its meaning that the word came first to include the place from which minerals are obtained by such an excavation as well as the excavation itself; and secondly, to mean that place alone, without regard to the excavation. "The primary meaning of the word 'mine,' standing alone, is an underground excavation made for the purpose of getting minerals. In leases and similar documents it is commonly used in a slightly different sense. There the word includes the stratum of the minerals as well as the excavation made to win it.[1]

Illustrations.

A brickfield,[2] or a gravel or chalk or ordinary clay pit,[3] is, therefore, in the nature of a quarry rather than a mine. On the other hand, a place, from which limestone [4] or freestone,[5] or clay,[6] obtained by underground workings, was gotten, has been held to be a mine within the meaning of the Act, 43 Eliz. c. 2. And shares in a slate company, whose operations had been principally carried on underground, and not by open-air workings, have been held to be "shares in mines;" so as to pass under those words in a bequest.[7] And a slate quarry, worked by underground workings, has been held to be a mine within the meaning of the Met. Mines Reg. Act, 1872.[8]

Secondary senses of mine and quarry.

Although the word "mine" generally points to underground, and the word "quarry" to surface, workings, these are not their only or necessary meanings. "The word 'mines' is . . . in a secondary sense very frequently applied to a place

[1] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555, *per* Kay, J. See also Glasgow *v.* Farie, 13 A. C. 670, *per* Lord Halsbury, 683, 684, *per* Lord Herschell, 687, *per* Lord Macnaghten; Mid. R. Co. *v.* Robinson, 15 A. C. 31, *per* Lord Herschell.

[2] Edmonds *v.* Eastwood, 2 H. & N. 825.

[3] Errington *v.* Met. R. Co., 19 Ch. D. 571; Tucker *v.* Linger, 21 *ib.* 36; Newton, Chambers & Co. *v.* Hall, 1907, 2 K. B. 459.

[4] R. *v.* Sedgley, 2 B. & Ad. 65.

[5] R. *v.* Dunsford, 2 A. & E. 568.

[6] R. *v.* Brettel, 3 B. & Ad. 424. Cf. R. *v.* Alberbury, 1 East, 534; R. *v.* Woodland, 2 East, 164; R. *v.* Brown, 8 East, 528; Glasgow *v.* Farie, 13 A. C. 676, 677.

[7] Cleveland *v.* Meyrick, 16 W. R. 104.

[8] Sim *v.* Evans, 23 W. R. 730.

where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings, they are spoken of as iron mines, and so, too, with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term 'slate quarry' is undoubtedly sometimes made use of, though the workings are underground." [1] The word "mines" may even be used without impropriety to denote some quarries. Thus an open excavation of auriferous quartz would be generally called a gold mine.[2] Indeed, Lord Watson in *Glasgow* v. *Farie* [3] laid it down that "the word has been used in ordinary language to signify either the mineral substances which are excavated or mined; or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out." [3] Lord Macnaghten, however, in the same case,[4] said, "When we speak of mines in this country there is always some reference more or less direct to underground working."

Effect of context on meaning of mine.

The proper meaning of "mines" may be varied by the context.[5] "'Mines' and 'minerals' are not definite terms: they are susceptible of limitation or expansion according to the intention with which they are used." [6] Thus, works for the getting of slate are assessable to the income tax under the Act, 5 & 6 Vict. c. 35, sch. A.,[7] as quarries, and not as mines, although the slate be obtained by underground working; [8] the Act distinguishing between "quarries of stone, slate," &c., and "mines," and applying to each a different principle of assessment.[9]

Quarries Act, 1894.

The place where furnace slag is deposited in a heap is not a quarry within section 1 of the Quarries Act, 1894.[10] But the place from which gravel and sand are taken, is.[11]

[1] Glasgow *v.* Farie, 13 A. C. 684, *per* Lord Herschell. Cf. Sim *v.* Evans, 23 W. R. 730.

[2] Glasgow *v.* Farie, *sup.* 677, *per* Lord Watson.

[3] 13 A. C. 677.

[4] P. 687.

[5] Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555.

[6] Glasgow *v.* Farie, *sup.* 675, *per* Lord Watson.

[7] See *post*, p. 557.

[8] Jones *v.* Cwmorthen Slate Co., 4 Ex. D. 97; affd. 5 *ib.* 93.

[9] *Ib.* 99: see *post*, p. 557.

[10] Scott *v.* Mid. R. Co., 13 T. L. R. 398.

[11] Scott *v.* Mid. R. Co., 1901, 1 K. B. 317. As to the meaning of "mines" and "minerals" in the Rail. & Wat. Cl. Acts, see *post*, pp. 30 *et seq.*

(γ) *Containing Chamber.*

Containing chamber—mine.

The word "mine" does not necessarily mean a cubical layer of earth, during and so long only as it contains minerals. The word is generally wide enough, if not in its primary sense, at all events according to the meaning given to it by the authorities, to include the space which is created according as the minerals are being worked, and the vacuum which is left after they have been worked out. In other words, a person who has an interest in a mine has, as such, *primâ facie*, an interest in the chamber which contains the minerals: and his interest in that chamber is precisely the same when it is in its natural state and filled with minerals; or when its natural state is altered by workings, and it consists partly or wholly of empty space.[1]

Effect when mines and surface severed.

It has accordingly been laid down, that, where the freeholder of land grants it, excepting the mines, he must be taken to except, *primâ facie*, the actual case in which the minerals are inclosed.[2] That case is, by the exception and without more, altogether out of the grant, and within the exception. The land is, in fact, severed in parallel cubical layers.[3] The grantee gets the layers containing the land above, the land below, and the land between, the mines; but he gets no more. The grantor gets, or rather never parts with, the layer containing the mines.[4] And no extent of working by the grantor can transfer to the grantee the space or shell which may be created; or any interest therein, proprietary or possessory.[5] And the same principle applies where the freeholder of land

[1] The definitions of "mine," given in Johnson's Dictionary and Wharton's Law Lexicon (*ante*, p. 1), are consistent with this result.

[2] See Bowser *v.* Maclean, 2 De G. F. & J. 420; Proud *v.* Bates, 34 L. J. Ch. 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166, 168; Eardley *v.* Granville, 3 Ch. D. 835; Ramsay *v.* Blair, 1 A. C. 705; Atkinson *v.* King, 2 L. R. (Ir.) 339. See also Glasgow *v.* Farie, 13 A. C. 687, *per* Lord Macnaghten.

[3] See Eardley *v.* Granville, 3 Ch. D. 834, *per* Jessel, M.R.; Ruabon, &c., Co., *v.* G. W. R. Co., 1893, 1 Ch. 434, *per* Kekewich, J.

[4] Bowser *v.* Maclean, 2 De G. F. & J. 420. See Proud *v.* Bates, 34 L. J. Ch. 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62; Eardley *v.* Granville, *sup.*, 834; Ramsay *v.* Blair, 1 A. C. 701, 704; Atkinson *v.* King, 2 L. R. (Ir.) 339; Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256.

[5] See *ib.* In Hamilton *v.* Graham, *sup.*, Lord Chelmsford dissented from the view of Lords Hatherley, Westbury, and Colonsay.

grants it by way of lease, excepting the mines ; [1] or where he grants the mines in fee simple, and excepts the surface ; [2] or where he grants the mines by way of lease, and excepts the surface ; [3] or where an Act of Parliament severs the ownership of surface and mines, and gives the fee simple of the surface to one man, and the fee simple of the mines to another.[4]

Containing chamber—vein, seam, and quarry.

There does not appear to be any reason why the proper senses of the words vein and seam should not, in these respects, be as extensive as that of mine. Indeed, the word vein, implying, as it does, the notion of tubularity, is probably as extensive in its primary sense. And there does not appear to be any reason why a similarly extensive meaning should not, in its proper sense, belong to the word quarry.[5]

(δ) *Colliery.*

Definitions of colliery.

" Colliery " is defined in Johnson's Dictionary as " the place where coals are dug ; " and Webster's and Worcester's Dictionaries contain similar definitions. Colliery is, however, a word sufficiently wide to include all contiguous and connected veins and seams of coal which are worked as one concern, without regard to the closes and pieces of ground under which they are carried.[6] It is also wide enough to include the engines and machinery in the " contiguous and connected veins." Webster in defining " colliery " refers to " coalery ; " and he defines " coalery " as " a coal-mine, coal-pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal." Indeed it is wide enough to include the business carried on, as well as the *locus in quo*, and

[1] See Proud *v.* Bates, 34 L. J. Ch. 406, 411 ; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166.

[2] See Ramsay *v.* Blair, 1 A. C. 701.

[3] See further, on this point, *post*, pp. 66, 67, 104, 105.

[4] See Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 49.

[5] In many Acts of Parliament or Rules thereunder " mine " is expressly defined ; see *e.g.*, 14 & 15 Vict. c. 94, s. 2 ; 15 & 16 Vict. c. 163, s. 2 ; 21 & 22 Vict. c. 109, s. 8 ; 35 & 36 Vict. c. 77, s. 41 ; 37 & 38 Vict. c. 54, s. 7 ; S. L. Act, 1882, s. 2 ; Workm. Comp. Act, 1897, s. 7 (2) (now repealed) ; Land Tr. Rules, 1903, r. 1 (5) ; Coal Mines Act, 1911, s. 1. " Quarry " is defined in the Quarry (Fencing) Act, 1887, s. 4 ; the Quarries Act, 1894, s. 1 ; the Workm. Comp. Act, 1897, s. 7 (2) ; and the Fact. & Works. Act, 1901, 6th sch. part 2. These definitions are mentioned in their proper places.

[6] See Hodgson *v.* Field, 7 East, 620.

the plant.[1] It may not, however, be an appropriate description of mines which are still inaccessible through want of a shaft or other development.[2]

Sect. 2.—MINERALS.

(α) *Etymological sense.*

Etymological sense.

"Mineral" in Johnson's Dictionary is defined as "fossile body; matter dug out of mines;" and in Jacob's Law Dictionary as "anything that grows in mines and contains metals." In fact, primarily, mineral means the thing which grows in a mine,[3] the contents or products of mines;[4] and its frequent sense requires that thing to be metalliferous.[5] "I should think that there could be no doubt that the word 'minerals' in old times meant the substances got by mining; and I think mining in old times meant subterranean excavation."[6]

(β) *Primâ facie Legal Sense.*

Coal, ironstone, etc., metallic minerals.

It need hardly be said that coal, at all events when workable to a profit,[7] has always been considered a mineral in a legal sense. The same may be said of the produce of mines of stratified ironstone, mines of shale and mines of fireclay, all being mines to which the C. M. Reg. Acts apply.[8] And so of the produce of mines to which the Met. M. Reg. Act applies.[9] And so of such a substance as salt.[10]

[1] See County of Gloucester Bank *v.* Rudry, &c., Co., 1895, 1 Ch. 634, *per* Lord Halsbury.

[2] Chaytor *v.* Trotter, 87 L. T., at p. 35, *per* Kekewich, J.

[3] See Proud *v.* Bates, 34 L. J. Ch. 411; Bell *v.* Wilson, 2 Dr. & Sm. 399; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62; Eardley *v.* Granville, 3 Ch. D. 834, 835.

[4] Glasgow *v.* Farie, 13 A. C. 690 *per* Lord Macnaghten.

[5] See Rosse *v.* Wainman, 14 M. & W. 872; Darvill *v.* Roper, 3 Dr. 299; Listowel *v.* Gibbings, 9 Ir. C. L. Rep. 233; Glasgow *v.* Farie, 13 A. C. 683, *per* Lord Herschell. Mineral meant *primâ facie* metallic mineral when used in the Act, 18 & 19 Vict. c. 32: see s. 2 (now repealed). But in 26 & 27 Vict. c. 49, mineral includes non-metallic mineral: see s. 37.

[6] Glasgow *v.* Farie, 13 A. C. 670, *per* Lord Halsbury.

[7] In the light of the most recent pronouncements this is not essential: see *post*, pp. 21–23.

[8] See *post*, Chap. XXI. As to fireclay, see Cal. R. Co. *v.* Glenboig, 1911, A. C. 290.

[9] See *post*, Chap. XXI.

[10] See N. B. R. Co. *v.* Budhill & Co., 1910, A. C., at p. 133, *per* Lord Gorell.

Whether, in a legal sense, other substances are or are not minerals, is a question which has frequently come before the Courts. The history of the decisions and dicta is curious. Having regard to the most recent pronouncements,[1] many of them can no longer be regarded as authorities. But others must still be so regarded, and it will probably be useful to call attention to all of them. They may be said, although only roughly, to cover four separate periods.

Decisions and dicta as to other substances.

The earliest decision was *Menzies* v. *Breadalbane*.[2] It was there held in the House of Lords (1822), upon an appeal from Scotland (1818), that an exception in a feu grant (dated in 1707) of the "haill mines and minerals of substance, nature, or quality," with liberty to work, making compensation for breaking the ground, did not include freestone worked by quarrying. The next decision, which was also a Scotch one, was *Hamilton* v. *Bentley*[3] (1841). It was there held, that an exception in a feu disposition (dated in 1793) of "coal and other metals, fossils and minerals" did not include freestone worked by quarrying. And the ground of the decision was, that, "in common parlance," the word "minerals" did not include a freestone quarry. A feu charter has always been construed with strictness against the superior;[4] but both decisions were independent of this fact. They were also, as will be seen,[5] in accordance with the most recent pronouncements.

First period.

The second period was that between the years 1845 and 1889. It led up to, and was, in its turn, influenced by, the definition in *Hext* v. *Gill*, to which reference is subsequently made.[6] During its course most of the decisions and dicta were in conflict with the earliest decisions, and many were in conflict with each other. It was held or said or assumed, that, *primâ facie*, the following substances, under the following conditions, were, or were not, minerals. In *Rosse* v. *Wainman*[7] (1845), that limestone common in the district, lying near the surface, and worked by quarrying, was a mineral within an exception of mines and minerals in an Inclosure Act of 1815: in

Second period.

[1] See *post*, pp. 16–24.
[2] 1 Shaw App. Cas. 225.
[3] 3 Dunlop, 1121.
[4] See Menzies *v.* Breadalbane, 1 Sc. App., p. 228; Glasgow *v.* Farie, 13 A. C. 674, 675, 682.
[5] See *post*, pp. 17, 22, 23.
[6] See *post*, p. 19.
[7] 14 M. & W. 858; affd. nom. Wainman *v.* Rosse, 2 Exch. 800.

Micklethwait v. *Winter*[1] (1851), that "stone grindstones and flagstones" worked by quarrying were minerals under an Inclosure Act of 1760[2]: in *Darvill* v. *Roper*[3] (1855), that limestone worked by quarrying was not a mineral, but only because of the terms of an instrument of severance and the particular circumstances in which it was considered to have taken effect: in *Brown* v. *Chadwick*[4] (1857) and *Listowel* v. *Gibbings*[5] (1858), that limestone, which was common in the district both on and under the surface, was not a mineral: in *Salisbury* v. *Gladstone*[6] (1861), that common clay was: in *Church* v. *Inclosure Commissioners*[7] (1862), that a substance described as "valuable brick earth under the surface," and which could not be worked without destroying it, was not: in *Brown's Trust Estate*[8] (1863), that limestone was not: in *Hanmer* v. *Chance*[9] (1864), that white vitreous sand, used (as its name implied) for the manufacture of glass, was: in *Bell* v. *Wilson*[10] (1865), that freestone was: in *Cowley* v. *Wellesley*[11] (1866), that gravel, and also (it would appear) loam, peat and bog earth were: in *Midland Railway Co.* v. *Checkley*[12] (1867), that "gravel, marle, fireclay, or the like," and "every species of stone, whether marble, limestone or ironstone," were:[13] in *Jamieson* v. *N. B. R. Co.*[14] (1868), that a bed of freestone 50 feet in depth, and lying from 8 to 18 feet below the surface, was: in *Mawson* v. *Fletcher*[15] (1870), that freestone and limestone were: in *Hext* v. *Gill*[16] (1872), that china clay was: in *A.-G.* v. *Tomline*[17] (1874), that coprolites, which are generally supposed to be merely the fossilized dung of animals, were: in *Att.-Gen.* v. *Mylchreest*[18] (1879), that, in

[1] 6 Exch. 644.

[2] Probably both these cases should be regarded as decisions as to, not the *prima facie* meaning, but variations from the *prima facie* meaning. They are further referred to, *post*, p. 28.

[3] 3 Dr. 294. See, as to this case, the criticism of Jessel, M.R., in Tucker *v.* Linger, 21 Ch. D. 32. See also Dolan *v.* Davis, 32 L. R. 5 Ir. 392.

[4] 7 Ir. C. L. Rep. 101.

[5] 9 *ib.* 223.

[6] 6 H. & N. 127.

[7] 11 C. B. N. S. 679–681.

[8] 11 W. R. 19.

[9] See 11 L. T. N. S. 667: see also 668, 669, 670. This case was reversed (see 4 D. G. J. & S. 626); but nothing was said in the Court of Appeal which affects the above statement.

[10] 2 Dr. & Sm. 398, 399; 1 Ch. 303, 308.

[11] 1 Eq. 659; 35 Beav. 639.

[12] 4 Eq. 25.

[13] The stone in question lay 30 feet below the surface, was worked by quarrying, and was used for road making.

[14] 6 Sc. L. R. 188.

[15] 6 Ch. 91–93, 94.

[16] 7 Ch. 699.

[17] 5 Ch. D. 750. Cf. Dant *v.* Moore, 9 L. T. N. S. 381, where coprolites were held not to be stone within the meaning of a Nav. Act.

[18] 4 A. C. 305.

"the popular sense," clay and sand were not: in *Dixon* v. *Cal. Railway Co.* [1] (1879), that limestone 16 to 20 feet thick, and lying close to the surface, was: in *Metropolitan Railway Co.* v. *Cotton's Trustees* [2] (1881), that "London clay" had never been held to be: in *Errington* v. *Metropolitan Railway Co.* [3] (1882), that beds of gravel or clay near the surface, and obtained by surface workings, were: in *Mid. R. Co.* v. *Haunchwood, &c., Co.*[4] (1882), that a bed of clay, on which the railway was built, was: in *Dudley's Settled Estates* [5] (1882), that salt obtained by the evaporation of brine-water pumped up from a depth of 150 feet was not: in *Loosemore* v. *Tiverton, &c., R. Co.*[6] (1882), that clay, which had a commercial value, and lay near but under the surface, was: in *Tucker* v. *Linger* [7] (1883), that (*a*) flints turned up in the ordinary course of ploughing were not; [8] (*b*) it was doubtful whether any substance, which lies loosely upon the surface, was [9]: (*c*) flints under the surface were: [10] and (*d*) sand, when worked at a profit, and got by digging from beneath, was: [11] in *Robinson* v. *Milne* [12] (1884), that common brick clay was: in *Hamilton* v. *N. B. R. Co.* [13] (1886), that (*a*) common earth and sand were; (*b*) stone workable to a profit was; and (*c*) stone not workable to a profit was not: in *Elwes* v. *Brigg Gas Co.*[14] (1886), that a pre-historic boat embedded in the soil 6 feet below the surface was not: in *Att.-Gen.* v. *Welsh Granite Co.*[15] (1887), that granite was: and in *Glasgow* v. *Farie* (1889), that (*a*) a bed of common clay 20 to 30 feet deep, lying immediately below the surface, "in common parlance," was not; [16] and (*b*) freestone was not.[17] It may be mentioned,

[1] 7 R. 216.

[2] 45 L. T. 104 (*per* Jessel, M.R.).

[3] 19 Ch. D. 571, 578 (a subsequent stage of the same litigation, and before a Court of Appeal which included Jessel, M.R.).

[4] 20 Ch. D. 555.

[5] Cited, *post*, p. 186.

[6] 22 Ch. D. 42–43.

[7] 21 Ch. D. 18; 8 A. C. 508.

[8] 21 Ch. D., at p. 26.

[9] 8 A. C., at pp. 512–513.

[10] 21 Ch. D., at pp. 38–39; 8 A. C., at p. 512.

[11] 21 Ch. D., at p. 36. "Sand" was in terms excepted, as well as "minerals." See *post*, p. 27.

[12] 53 L. J. Ch. 1072.

[13] 13 R. 454.

[14] 33 Ch. D. 562: see pp. 566–7.

[15] 35 W. R. 617.

[16] 13 A. C. 657; reversing the decision of the Court of Session; restoring the judgment of Lord McLaren, and approving the dissenting judgment of Lord Mure in the Court of Session: see 14 R. 346, 354, 357.

[17] See S. C. *per* Lord Mure; following Menzies *v.* Breadalbane and Hamilton *v.* Bentley, *ante*, p. 11.

as regards the decision in *Att.-Gen.* v. *Tomline*,[1] that coprolites have been recognized as minerals in Acts of Parliament.[2]

Lord Halsbury's summary as to second period.

Lord Halsbury, in reference to typical cases during this second period, summarized them, although only negatively, as follows: "One might summarize these decisions, and say a mineral need not be metallic. It need not be subjacent; it need not be worked by a mine; it need not be in any one particular distinguished from any part of the substance of the earth, using the word 'earth' as applicable to every portion of this habitable globe. Even the word 'organic' must be rejected if referred to some of the substances which form part of the earth."[3]

Third period.

The third period was that between the year 1889 and the first part of the year 1909, and at the beginning of it the definition in *Hext* v. *Gill* was amended in *Jersey* v. *Neath Poor Law Union*, as is subsequently stated.[4] It was throughout influenced by either the original or the amended definition; although not without protests as to their correctness.[5] During its course (as during the second period) most of the decisions and dicta were in conflict with the earlier decisions, and some were in conflict with each other. It was held or said or assumed, that, *primâ facie*, the following substances, under the following conditions, were, or were not, minerals:—In *Jersey* v. *Neath Poor Law Union* [6] (1889), that brick earth and clay, which lay immediately below the surface, and were workable to a profit, were: in *Fishbourne* v. *Hamilton* [7] (1890), that beds of limestone worked by quarrying were: in *Ruabon, &c., Co.* v. *Great Western Railway Co.*[8] (1892), that terra cotta clay coming up nearly to the surface was: in *Glasgow and South Western Railway Co.* v. *Bain* [9] (1893), that freestone obtained by quarrying was: in *Shaftesbury* v. *Wallace* [10] (1897), that brick clay was: in *Scott* v. *Midland Railway Co.*[11] (1897), that furnace slag deposited in a heap was

[1] *Ante*, p. 12.

[2] See 41 Vict. c. 16, sch. 4, part 2 (Factories, now repealed); Quarries Act, 1894, s. 1; Fact. & Works. Act, 1901, sch. 6, part 2.

[3] Glasgow *v.* Farie, 13 A. C. 671.

[4] See *post*, pp. 20, 21.

[5] See *post*, p. 21.

[6] 22 Q. B. D. 555.

[7] 25 L. R. (Ir.) 483.

[8] 1893, 1 Ch. 427.

[9] 21 R. 134.

[10] 1897, 1 Ir. R. 381, 402.

[11] 13 T. L. R. 398; a case under the Quarries Act, 1894.

not: in *Edinburgh Trustees* v. *Clippen's Oil Co.*[1] (1898), that limestone was: in *Boileau* v. *Heath*[2] (1898), that tap-cinder (which is a refuse produced in manufacturing iron from ironstone), thrown on the surface, and allowed to accumulate there, was not: in *Johnstone* v. *Crompton*[3] (1899), that (*a*) red rock not workable to a profit, but useful for building purposes, was; and (*b*) coal not workable to a profit was: in *Trinidad Asphalt Co.* v. *Ambard*[4] (1899), that asphalt or pitch was: in *Scott* v. *Midland Railway Co.*[5] (1901), that gravel and sand were: in *Great Western Railway Co.* v. *Blades*[6] (1901), that blue brick clay of great thickness, and lying immediately below the surface, was not: in *Greville* v. *Hemingway*[7] (1902), that sandstone was: in *Todd Birleston, &c.* v. *North Eastern Railway Co.*[8] (1903), that common clay or brick earth lying immediately below the surface was not: in *Staples* v. *Young*[9] (1908), that sand lying at a great depth, but coming up to about 10 feet from the surface, five-sixths of which surface also consisted of sand, was not: in *Skey* v. *Parsons*[10] (1909), that clay and stone, which were in substance parts of the surface, and were not commercially workable, were not: and in *Forth Bridge Railway Co.* v. *Dumfermline*[11] (1909), that whinstone obtained by quarrying was.

Result of decisions, etc., during second and third periods.

In all or most of the cases during the second period, which decided or stated that the substance in question was a mineral, workability to a profit was either proved or assumed, and was the ground of the decision or statement. In one of the cases which decided that the substance in question was not a mineral, non-workability to a profit was proved, and was the ground of the decision. These results were in accordance with the definition in *Hext* v. *Gill*, to which reference is subsequently made.[12] In another of the cases which stated that the substance in question was not a mineral, the statement was based on the decisions during the first period.[13] In others of the cases which

[1] 25 R. 504.
[2] 1898, 2 Ch. 301.
[3] 1899, 2 Ch. 190.
[4] 1899, A. C. 594, 602.
[5] 1901, 1 K. B. 317, 320.
[6] 87 L. T. 443.
[7] 1901, 2 Ch. 624.
[8] 1903, 1 K. B. 603.
[9] 1908, 1 Ir. R. 135.
[10] 101 L. T. 103.
[11] 1909, S. C. 493.
[12] See *post*, p. 19.
[13] See Glasgow *v.* Farie, 14 R. 346 (as to freestone), *per* Lord Mure, cited *ante*, p. 13. This appears to be the only case during either the 2nd or 3rd period, which followed the cases during the first.

decided or stated that the substance in question was not a mineral, the element of profit appears to have been ignored. Except as above stated, the cases during the second period proceeded upon special grounds, which are not affected by the recent pronouncements.[1] In most of the cases during the third period, which decided or stated, that the substance in question was a mineral, workability to a profit was either proved or assumed, and was the ground of the decision. In one case the possession of a use and value independently of the rest of the soil was proved, and was the ground of the decision. This was in accordance with the amended definition in *Jersey* v. *Neath Poor Law Union*, to which reference is subsequently made.[2] One of the cases, which decided that the substance in question was not a mineral, proceeded in part upon non-workability to a profit. In others of such cases the element of profit, or use and value, appears to have been ignored. Except as above stated, the cases during the third period proceeded upon special grounds, which are not affected by the recent pronouncements.[3]

Fourth period.

Four cases were decided during the fourth period. The first of these [4] was *North British Railway Co.* v. *Budhill, &c., Co.* (1909).[5] It was there held in the House of Lords, upon an appeal from Scotland, that conveyances which, either by reference to the Rail. Cl. Consolidation (Scotland) Act, 1845, or in terms, excepted the mines and minerals, did not except sandstone. The sandstone was of commercial value. But it formed the substratum of the soil, and there was nothing exceptional in it, as regards either higher value or rarety.[6] The only question actually decided was as to sandstone. The principle of it, however, equally applies to "chalk or clay or granite, or any other rock which forms the crust of the earth." [7] The second case was *Great Western Railway Co.* v. *Carpalla, &c., Co.*[8] It was there held in the House of Lords that china clay was a mineral and was therefore excepted by s. 77 of the Rail. Cl. Consolidation Act, 1845. The ground of the decision was that it was not part

[1] See *post*, pp. 17, 23.
[2] See *post*, pp. 20, 21.
[3] See *post*, pp. 17, 23.
[4] It is, however, reported in a subsequent part of the same volume.
[5] 1910, A. C. 116.
[6] Reversing S. C. 1909, S. C. 277.
[7] See North B. R. *v.* Budhill, 1910, A. C. 126, *per* Lord Loreburn. The L. C. appears to have been speaking generally and not merely as to the Railway Cl. Acts.
[8] 1910, A. C. 83.

of the ordinary composition of the soil in the district, but that its presence was rare and exceptional.[1] The third case was *Cal. Railway Co.* v. *Glenboig Union Co.*[2] It was there held in the House of Lords, upon an appeal from Scotland, that seams of fireclay, containing a large proportion of refractory substances, which made it valuable for the manufacture of bricks capable of resisting high temperatures, were minerals, and were therefore excepted by s. 70 of the Rail. Cl. Consolidation (Scotland) Act, 1845.[3] The fourth case was *Symington* v. *Cal. Railway Co.*[4] It was there held in the House of Lords upon an appeal from Scotland, that evidence was admissible to show that freestone, said to be of a rare and beautiful quality, was a mineral.

Importance of later decisions.

It need hardly be said that the *North British Railway Co.* v. *Budhill, &c., Co.* is a case of far-reaching importance. It was a recurrence to the principle of the earliest decisions.[5] It in terms overruled *Jamieson* v. *North British Railway Co.*,[6] *Dixon* v. *Cal. Railway Co.*,[7] *Glasgow and South Western Railway Co.* v. *Bain*,[8] and *Forth Bridge Railway Co.* v. *Dumfermline*;[9] and it must be taken to have overruled many other of the decisions and dicta during the second and third periods.[10] It also contains new pronouncements as to the meaning of the word "minerals," to which reference is subsequently made.[11] *Great Western Railway Co.* v. *Carpalla, &c., Co.* is also an important case. It dealt with the same subject-matter as *Hext* v. *Gill*, but it explained much that was left unexplained in the latter case. *Cal. Railway Co.* v. *Glenboig Union Co.* is

[1] Affirming the decisions of Eve, J., and the Court of Appeal, 1909, 1 Ch. 218: see pp. 229–232, 236.

[2] 1911, A. C. 290.

[3] Affg. S. C. 1910, S. C. 951.

[4] 1912, A. C. 87, reversing Cal. R. Co. *v.* Symington, 48 S. L. R. 539.

[5] *Ante*, p. 11.

[6] *Ante*, p. 12.

[7] *Ante*, p. 13.

[8] *Ante*, p. 14.

[9] *Ante*, p. 15.

[10] Most (if not all) of the following cases, to which reference has been already made: Darvill *v.* Roper; Salisbury *v.* Gladstone; Bell *v.* Wilson; Cowley *v.* Wellesley; Mid. R. Co. *v.* Checkley; Mawson *v.* Fletcher; Errington *v.* Met. R. Co.; Mid. R. Co. *v.* Haunchwood, &c., Co.; Looseman *v.* Tiverton, &c., R. Co.; Tucker *v.* Linger (as to the sand); Robinson *v.* Milne; A.-G. *v.* Welsh Granite Co.; Jersey *v.* Neath Poor Law Union; Fishbourne *v.* Hamilton; Shaftesbury *v.* Wallace; Johnstone *v.* Crompton (as to the red rock); Scott *v.* Mid. R. Co. (as to the gravel and sand); Greville *v.* Hemingway; all referred to, *ante*, pp. 12–15.

[11] *Post*, pp. 22, 23.

also of importance ; amongst other reasons because its effect was to explain some of the embarrassment which would or might have been caused by *Great Western Railway* v. *Carpalla, &c., Co.*,[1] if that case had stood alone.

Immaterial that substance only workable by quarrying.

It was frequently held during the second and third periods, that the mere fact that the substance in question was usually worked, or could only be profitably worked, by open quarrying, did not prevent it from being a mineral.[2] And the same was held in *Great Western Railway Co.* v. *Carpalla, &c., Co.*[3]

Or is mixture of what are admittedly minerals.

And it was said in *Great Western Railway Co.* v. *Carpalla, &c., Co.* that the fact that the substance in question was a mere mixture of different minerals did not prevent it from being itself a mineral in a legal sense. "To a mineralogist the question would mean, Was it a definite and specific mineral, homogeneous, and possessing known mineralogical characteristics ? That is an issue which is perfectly immaterial here. Many of the best-known minerals are mixtures of a large variety of different minerals if that word be used in its strict mineralogical sense, but that does not prevent the well-known mixture being in the eye of the law a mineral." [4]

Whether legal sense a question of evidence.

It was stated in the Court of Appeal in *Great Western Railway* v. *Carpalla, &c., Co.*,[5] that the question, whether a particular substance is or is not a mineral in a legal sense, is not a matter of evidence, but a matter for the Court. It must not, however, be understood from this that evidence of facts is irrelevant. In *Symington* v. *Cal. Railway Co.*,[6] it was held that, when the meaning of the word "minerals" was in question, a litigant would never be precluded from giving evidence of what the facts in the particular case are.[7]

[1] See *post*, pp. 48–50.

[2] See Bell *v.* Wilson, 1 Ch. 303 ; Mid. R. Co. *v.* Checkley, 4 Eq. 19 ; Hext *v.* Gill, 7 Ch. 699, 713 ; Errington *v.* Met. R. Co., 19 Ch. D. 571 ; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555 ; A.-G. *v.* Welsh Granite Co., 35 W. R. 617 ; Fishbourne *v.* Hamilton, 25 L. R. (Ir.) 483 ; Greville *v.* Hemingway, 87 L. T. 443 ; see to the contrary, Church *v.* Incl. Commrs., 11 C. B. N. S. 681.

[3] 1910, A. C. 86.

[4] 1909, 1 Ch. at pp. 230, 231, *per* Moulton, L.J.

[5] 1909, 1 Ch. 230–1, *per* Moulton, L.J. ; 237, *per* Farwell, L.J.

[6] 1912, A. C. 87 : see pp. 92, 93.

[7] Reversing Cal. R. Co. *v.* Symington, 1911, S. C. 552 : see also Tucker *v.* Linger, 21 Ch. D., at p. 37, *per* Jessel, M.R. ; p. 40, *per* Lindley, L.J. And see Lord Macnaghten's judgment when the Carpalla case was before the House of Lords, 1910, A. C. 83 ; and the

It is now desirable to refer to the general definitions of the word minerals. General definitions.

In *Bell* v. *Wilson*,[1] Kindersley, V.-C., said, that he did not see why the term should not, in the largest sense, include the very mould or loam, which lies more immediately at the surface, and upon which the verdure grows and thrives. Kindersley, V.-C., in Bell *v.* Wilson.

In *Midland Railway* v. *Checkley*,[2] Lord Romilly said: "Stone is, in my opinion, clearly a mineral, and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fireclay, or the like, comes within the word 'mineral,' when there is a reservation of the mines and minerals from a grant of the land. Every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, within the same category." Lord Romilly in Mid. R. Co. *v.* Checkley.

In *Hext* v. *Gill*[3] it was laid down by Mellish, L.J., that "the result of the authorities, without going through them, appears to be this: that a reservation of 'minerals' includes every substance, which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."[4] Hext *v.* Gill.

James, L.J., in the same case,[5] suggested, that, but for the authorities, the meaning to be attributed to the words "mines and minerals" in a grant ought to be a question of fact to be determined according to "the vernacular of the mining world, the commercial world, and landowners" at the date of the instrument. James, L.J., in Hext *v.* Gill.

Lord Halsbury, in *Glasgow* v. *Farie*,[6] in the House of Lords, expressed[7] a preference for the view suggested by James, L.J. He objected to the rule laid downby Mellish, L.J., on the ground of the uncertainty arising from the introduction of the element Lord Halsbury in Glasgow *v.* Farie.

observations in the House of Lords in Cal. R. Co. *v.* Glenboig Union Co., 1911, A. C. 290.

[1] Dr. & Sm. 398, 399.

[2] 4 Eq. 19: see p. 25.

[3] 7 Ch. 699: see p. 712.

[4] See also A.-G. *v.* Tomline, 5 Ch. D. 762; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 555; Tucker *v.* Linger, 21 *ib.* 25, 35, 36; Loosemore *v.* Tiverton, &c., Co., 22 *ib.* 42, 43; Robinson *v.* Milne, 53 L. J. Ch. 1072; A.-G. *v.* Welsh Granite Co., 35 W. R. 617; Johnstone *v.* Crompton, 1899, 2 Ch. 195; Greville *v.* Hemingway, 87 L. T. 445.

[5] 7 Ch. at p. 719.

[6] 13 A. C. 657.

[7] P. 669.

of profit. It is "obvious to see, that, if that is an essential part of the definition, the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next." [1]

Lord Herschell in Glasgow v. Farie.

Lord Herschell in the same case said that, in its widest signification, and apart from any context, the word "minerals" includes all substances forming part of the crust of the earth, other than the layer of soil which sustains vegetable life.[2] He also applied the rule laid down by Mellish, L.J., to the construction of the words "mines of minerals" in section 18 of the Waterworks Clauses Act.[3] "I think," he said,[4] "the reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit, and have a value independent of the surface of the land."

Lord Macnaghten in Glasgow *v.* Farie.

Lord Macnaghten in the same case expressed his agreement with Lord Halsbury's objection to the rule laid down by Mellish, L.J.[5] He also, however, agreed with Lord Herschell that the word "mineral" ought probably to bear, *primâ facie*, the wide signification already referred to,[6] and he added,[7] "It has been laid down, that the word 'minerals,' when used in a legal document, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning."

Court of Appeal in Jersey *v.* Neath Poor Law Union.

In *Jersey* v. *Neath Poor Law Union*,[8] Bowen, L.J., said in reference to the rule laid down by Mellish, L.J.: "Speaking for myself, I am of opinion that the rule of construction there laid down with regard to ordinary reservations in ordinary grants [9] is absolutely right. . . . The object is to treat differently from the rest of the land with respect to its enjoyment certain constituent parts of the earth, which have . . . a use and value of their own independent of their being constituents of

[1] P. 670.
[2] P. 683.
[3] See further as to this, *post*, p. 38.
[4] P. 685.
[5] Pp. 689, 690.
[6] *Ante*, pp. 19, 20.
[7] P. 690.
[8] 22 Q. B. D. 555. See also p. 558, *per* Lord Esher.
[9] As contrasted with cases like Glasgow *v.* Farie, 13 A. C. 657; see *post*, pp. 34, 43.

the soil. That indicates a line or limit, down to which the definition of 'minerals' may usefully extend, and beyond which it ought not to be extended. And he added,[1] with reference to Lord Halsbury's objection on the ground of uncertainty above referred to: "Mellish, L.J., does not say, nor I think mean, that the test was, whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil." Lord Esher and Fry, L.J., took the same view.[2] Fry, L.J., in the same case, expressed [3] a doubt, whether the principle suggested by James, L.J., and approved by Lord Halsbury,[4] of construction according to "the vernacular of the mining world, the commercial world, and landowners" at the date of the instrument, would not introduce a very considerable difficulty into the construction both of ancient and modern documents, by rendering it necessary to determine the meaning of the words, not only in the English language as commonly used, but also in the vernacular of three classes of persons.

Lord Herschell in Midland Railway Co. *v.* Robinson.

In *Midland Railway Co.* v. *Robinson*,[5] Lord Herschell, in the House of Lords, referring to his own observations in *Glasgow* v. *Farie*,[6] said: "I did not intend, by these latter words, to suggest that the value of the mineral substances at the time of the reservation was the test whether they were reserved or not." [7]

Lord Ashbourne in Fishbourne *v.* Hamilton.

In *Fishbourne* v. *Hamilton*,[8] Lord Ashbourne, in the Irish Court of Appeal, said: [9] "In my opinion *Hext* v. *Gill* still remains an authority binding upon this Court." [10]

Lord Halsbury in Todd, &c., Co. *v.* N.E.R. Co

In *Todd, &c., Co.* v. *North Eastern Railway Co.*,[11] Lord Halsbury, referring to *Jersey* v. *Neath Poor Law Union*, emphatically repeated his own objection to the rule. "I think that the House of Lords did not adopt that part of Mellish, L.J.'s, judgment. I think it is absolutely wrong to say that the question

[1] 22 Q. B. D. 562.
[2] Pp. 559, 560, 563, 564.
[3] P. 564.
[4] *Ante*, p. 19.
[5] 15 A. C. 19.
[6] See *ante*, p. 20.
[7] Mid. R. Co. *v.* Robinson, 15 A. C. 26, 27.
[8] 25 L. R. (Ir.) 483.
[9] P. 501.
[10] Judges of first instance expressed similar views: see Johnstone *v.* Crompton, 1899, 2 Ch. 197, *per* Byrne, J.; G. W. R. Co. *v.* Blades, 1901, 2 Ch. 631, 637, *per* Buckley, J.
[11] 1903, 1 K. B. 603,

whether a thing can be worked at a profit or not is to determine whether it is a mineral or not." [1]

Moulton and Farwell, diff. in G.W.R. Co. *v.* Carpalla Co.

In *Great Western Railway Co.* v. *Carpalla, &c., Co.*[2] Moulton, L.J., said : [3] " If I were rash enough to venture on a definition of ' mineral,' I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which make it occupy so much of the earth's crust. . . . To dig out ballast and crushed stone and earth . . . for the purpose of making embankments does not seem to me to be making use of minerals. . . . On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral. Limestone may vary from a poor quality that it is only worth burning into lime up to the very finest Carrara marble, but all those gradations have a value in use, either for building, or statuary, or for the manufacture of lime." Farwell, L.J., in the same case, referring to the rule laid down by Mellish, L.J., said : [4] " I do not think the Lord Justice intended to say that the definition of ' minerals ' can depend on the fluctuation of the market. What I understand him to mean is that china clay might be regarded as a mineral, because it is one of those things which are usually worked with the object of making a profit, not because a profit is made."

Lord Loreburn in N.B.R. Co. *v.* Budhill, &c., Co.

In *North British Railway Co.* v. *Budhill, &c., Co.*[5] Lord Loreburn said : " I think that in deciding whether or not in a particular case exceptional substances are minerals, the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow* v. *Farie*.[6] The Court has to determine ' what these words meant in the vernacular of the mining world, the commercial world, and landowners ' at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral."

Lords Gorell and Shaw in same case.

In the same case Lords Gorell [7] and Shaw [8] expressed similar views.

Cal. R. Co. *v.* Glenboig, &c., Co.

Similar observations were made by Lord Loreburn (in which

[1] 1903, 1 K. B. p. 606.
[2] 1909, 1 Ch. 218.
[3] P. 231.
[4] Pp. 237, 238.
[5] 1910, A. C. at pp. 127, 128.
[6] *Ante*, p. 19.
[7] See pp. 133–134.
[8] See pp. 138, 140. Lord Atkinson concurred : see p. 128.

Lords Macnaghten, Shaw and Robson concurred) in *Cal. Railway Co.* v. *Glenboig, &c., Co.*[1]

Result of recent cases in House of Lords.

In the medley of definitions explanations and criticisms which preceded *North British Railway Co.* v. *Budhill, &c., Co.*, the question "What is a mineral" was constantly asked in the Press, and often in the Courts, and sometimes in Parliament; and always in vain. The truth is that "no definition of 'minerals' is obtainable; the variety of meanings which the use of the word 'minerals' admits of being of itself the source of all the difficulty."[2] However, the pronouncements in *North British Railway Co.* v. *Budhill, &c., Co.*, and *Cal. Railway Co.* v. *Glenboig, &c., Co.* will probably prove a sufficient solution for all practical purposes. "The purpose of profit may have a bearing upon the question whether certain substances have been recognised as included in the term minerals, but does not necessarily determine that they have been ordinarily understood to be so included.'[3] And the same may be said about the element of independent use and value.[4] The question will in future depend upon what, at the date of the instrument, was included in the words in "common parlance," as was said in *Hamilton* v. *Bentley*[5] and *Glasgow* v. *Farie*;[6] or "in the vernacular of the mining world the commercial world and landowners," as was said by James, L.J., in *Hext* v. *Gill*;[7] or in "the popular sense," as was said in *A.-G.* v. *Mylchreest.*[8] All these expressions appear to mean the same thing. And with respect to the second of them it is improbable that, in practice, there would be much difficulty in dealing with "the vernacular of three classes of persons," such as that suggested by Fry, L.J., in *Jersey* v. *Neath Poor Law Union.*[9] Even if the "three classes" disagreed between themselves, it would not be outside the daily routine of a jury, or a Court exercising its functions, to untie the knot.

Date at which question determinable.

A further difficulty may be thought to arise from Lord

[1] 1911, A. C. 290.

[2] Cal. R. Co. *v.* Glenboig, &c., Co., 1911, A. C. 299, *per* Lord Loreburn. Similar observations had been previously made in Staples *v.* Young, 1908, 1 Ir. R. at p. 154.

[3] See N. B. R. Co. *v.* Budhill, &c., Co., 1910, A. C. 132, *per* Lord Gorell.

[4] See *ante*, pp. 20, 21.

[5] *Ante*, p. 11.

[6] *Ante*, p. 13.

[7] *Ante*, p. 19.

[8] *Ante*, pp. 12, 13.

[9] See N. B. R. Co. *v.* Budhill, &c., Co., 1910, A. C., at p. 127, *per* Lord Loreburn; p. 140, *per* Lord Shaw.

Herschell's observations in *Midland Railway Co.* v. *Robinson*,[1] already cited. The inference suggested may be thought to be, that the date, at which the meaning of the words used in a reservation has to be ascertained, is not necessarily the date of the instrument itself, but may be some subsequent date. It can hardly be, however, that Lord Herschell intended an inference which would be contrary to all principle, and inconsistent with many other pronouncements.[2]

Effect of present day meaning on previous transactions.

In any event there cannot in future be any real substance in the difficulty, which Fry, L.J., suggested in *Jersey* v. *Neath Poor Law Union;* and which Lord Herschell may have felt in *Midland Railway Co.* v. *Robinson.* If evidence is given of the common meaning of the word "minerals" at the present day, it will now be accepted as its meaning at the time of the sale, unless sufficient ground is given for coming to a contrary conclusion.[3]

No difference between grant and exception—Inclosure Acts.

The proper legal definition of the word minerals ought, it is apprehended, to be applied in the case of a grant of minerals equally with a case in which they are excepted. And there is, it is apprehended, no difference between the case of an ordinary grant or exception, and an exception under such an instrument as an Inclosure Act.

(γ) *Variation of Primâ Facie Sense.*

Generally.

In all cases the *primâ facie* meaning of the word minerals will yield to the intention of the parties, where such intention is made reasonably clear.[4] "The only principle which I can extract from these authorities is this: that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the

[1] *Ante*, p. 21.

[2] See Hext *v.* Gill, 7 Ch. at p. 719, *per* James, L.J.; N. B. R. Co. *v.* Budhill, &c., Co., 1910, A. C. at pp. 127, 128, *per* Lord Loreburn; Cal. R. Co. *v.* Glenboig, 1910, S. C. 962, *per* Lord Dunedin: see also G. W. R. *v.* Carpalla, &c., Co., 1909, 1 Ch. at p. 237, *per* Farwell, L.J.

[3] See N. B. R. Co. *v.* Budhill, 1910, A. C. 134, *per* Lord Gorell; Cal. R. C. *v.* Glenboig, &c., Co., 1911, A. C. 298, *per* Lord Loreburn.

[4] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555; Loosemore *v.* Tiverton, &c., R. Co., 22 *ib.* 42; Glasgow *v.* Farie, 13 A. C. 691; Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 560, 561, 562.

substance of the transaction or arrangement which such deed or Act embodies. 'Mines' and 'minerals' are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used." [1]

Most of the following illustrations are derived from cases decided during the second and third periods before referred to,[2] and some may not apply to the position created by the recent pronouncements.[3] But others apply *mutatis mutandis*, to the position so created; and it will probably be useful to call attention to all of them. Illustrations.

Language may be used before the word "minerals," or before the words "mines and minerals," which may furnish an argument for restricting such word or words to things *ejusdem generis*.[4] So, during the second and third periods before referred to, it was said, that the use after the words "mines and minerals," of such words as "quarries and delfs of slagg, slate, or stone;" [5] or "sand, quarries of stone, brick earth, and gravel pits;" [6] or other words of enumeration might show an intention to use the word "minerals" in a restricted sense. So during the same periods it was said that where effect could not be given to a particular clause of an instrument without destroying a previous clause, an intention might be shown, that such particular clause should have a narrow meaning.[7] It was, however, during the same periods held, that, where in a grant or exception the words "mines and minerals" were used, the word "mines" would not, *primâ facie*, be held to be the governing word; so as to restrict the *primâ facie* meaning of the word "minerals." [8] *A fortiori* where Meaning restricted—language of instrument.

[1] Glasgow *v.* Farie, 13 A. C. 675, *per* Lord Watson: Jersey *v.* Neath Poor Law Union, *sup.* 565, *per* Fry, L.J.; N. B. R. Co. *v.* Budhill, & Co., 1910, A. C. 130, *per* Lord Gorell.

[2] *Ante*, pp. 11–15.

[3] *Ante*, pp. 16–18.

[4] See Hext *v.* Gill, 7 Ch. 713; Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 563, 565, 566; Scott *v.* Mid. R. Co., 1901, 1 Q. B. 321. "All mines of coal, culm, iron, and all other mines and minerals whatsoever," should apparently be read "all mines of coal, &c., and all other mines and *all* minerals:" Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 588.

[5] See A.-G. *v.* Mylchreest, 4 A. C. 294, 307, 308. Cf. A.-G. *v.* Welsh Granite Co., 35 W. R. 617.

[6] See Tucker *v.* Linger, 21 Ch. D. 26, *per* Kay, J., 35, 36, *per* Jessel, M.R.; 8 A. C. 510, *per* Lord O'Hagan: see, however, 21 Ch. D. 38, 39, 40, *per* Cotton and Lindley, L.JJ. Cf. Shaftesbury *v.* Wallace, 1897, 1 Ir. R. 381.

[7] See Bell *v.* Wilson, 1 Ch. 308.

[8] See Bell *v.* Wilson, 1 Ch. 303, 308; and cf. the decision below, 2 Dr. & Sm. 402. See also Hext *v.* Gill, 7 Ch.

the expression used was "all mines of coal, culm, iron, and all other mines and minerals whatsoever, except stone quarries." [1] And during the same periods it was held, that, where it was impossible to get, or where it would not pay to get, a mineral otherwise than by quarrying, the circumstance that the person claiming to be entitled to it was not entitled to get it by quarrying was not of itself sufficient to restrict the meaning of the word "minerals." [2] It was said, during the same periods, that there would be greater reluctance to construe the word minerals in a limited sense where it was followed in the instrument in question by the words "within and under" than where it was followed by the word "under" alone.[3]

Meaning restricted—nature of transaction—ordinary purchase.

The nature of the transaction may also show an intention to use the word mineral in a restricted sense. In *Glasgow* v. *Farie*,[4] Lord Halsbury said, that, "if a man had purchased a site for his house, with a reservation of mines and minerals, neither he nor anybody alse would imagine that the vendor had reserved the stratum of clay upon which his house was built under the reservation of 'mines and minerals.'" In *Jersey* v. *Neath Poor Law Union*,[5] similar observations were made by the Court of Appeal: "Now, when land is bought for the purposes of waterworks and making a reservoir, I think it might reasonably be said that there was something in the nature of the transaction to show that the clay was to be used in carrying out the purposes of the Act or the conveyance, and could not have been intended to be reserved." [6]

Meaning restricted—nature of transaction—Railway and Waterworks Clauses Acts.

So in the case of purchases under the Railway and Waterworks Clauses Acts, as illustrated in *North British Railway Co.*

712; Glasgow *v.* Farie, 13 A. C. 690; Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 558, 559; Shaftesbury *v.* Wallace, 1897, 1 Ir. R. 402; and cf. Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552.

[1] Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 555, 558, 563, 566.

[2] Bell *v.* Wilson, *sup.*; Hext *v.* Gill, *sup.*; Shaftesbury *v.* Wallace, *sup.* 381: cf. Mid. R. Co. *v.* Haunchwood, &c., Co., *sup.*, see pp. 550, 551.

[3] See Mid. R. Co. *v.* Checkley, 4 Eq. 25, *per* Lord Romilly; Hext *v.* Gill, 7 Ch. 705, n., *per* Wickens, V.-C.; Robinson *v.* Milne, 53 L. J. Ch. 1072. For the meaning of "lands, mines, minerals, and royalties" in a Colonial Act, see A.-G. of Ontario *v.* Mercer, 8 A. C. 767; A.-G. of British Columbia *v.* A.-G. of Canada, 14 *ib.* 304 *et seq.*

[4] 13 A. C. 669.

[5] 22 Q. B. D. 555.

[6] 22 Q. B. D. 560, *per* Lord Esher: see also G. W. R. *v.* Blades, 1901, 2 Ch. at p. 638, *per* Buckley, J.

v. *Budhill, &c., Co.;*[1] which would presumably, however, have been decided in the same way on the mere language of the statutory words, and independently of considerations based on the nature of the transaction.[2]

Meaning restricted—custom—A.-G. *v.* Mylchreest.

In *A.-G.* v. *Mylchreest* [3] (which was decided during the aforesaid periods),[4] a contest arose between the Crown and the owners of customary tenements in the Isle of Man as to the title to the clay and sand in the tenements. The Act of Settlement of the Isle "saved" to the predecessors in title of the Crown all "mines and minerals of what kind and nature soever, quarries and delfs of slagg, slate, or stone." The Act had been passed for the purpose of declaring and confirming to the tenants their ancient customary estates; and an immemorial custom for the customary tenants to take the clay and sand was shown to exist. It was held, that the saving clause did not comprise the clay and sand.

Tucker *v.* Linger.

So in *Tucker* v. *Linger.*[5] There a farming lease provided, that the lessee should not commit waste, nor use the land for other than agricultural purposes; and it excepted "all mines and minerals, sand, quarries of stone, brick earth, and gravel pits." It was shown to have been the custom of the district during the preceding thirty or forty years for an agricultural tenant to remove the flints which were turned up in the ordinary course of ploughing, and to sell them for his own benefit. If the flints were not turned up and removed, the farms could not be properly cultivated. It was held, that "minerals" did not include the flints to which the custom applied, although it might include flints not got according to the custom.[6]

Custom generally in doubtful cases.

And, generally, a limited construction may, in doubtful cases, be put upon the word "minerals," where the custom of the country has adopted such construction;[7] or where continuous subsequent usage can be referred to, and is inconsistent with any other construction.[8]

[1] 1910, A. C. 116: see *post*, p. 45.
[2] See *ante*, pp. 22, 23.
[3] A. C. 294.
[4] See *ante*, pp. 12, 13.
[5] 8 A. C. 508.
[6] See *ib.* 21 Ch. D. 36, 37.
[7] See Darvill *v.* Roper, 3 Drew. 301; Bell *v.* Wilson, 2 Dr. & Sm. 395, 402, on appeal, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 705, n.; Tucker *v.* Linger, 21 Ch. D. 36, 37, 8 A. C. 510—513. See also Dashwood *v.* Magniac, 1891, 3 Ch. 324, 325, 354, 355.
[8] A.-G. *v.* Mylchreest, 4 A. C. 305, 308.

Meaning enlarged.

In *Rosse* v. *Wainman*,[1] an Inclosure Act of 1815 reserved to the lords "all mines and minerals" in the large terms usual in such cases; and gave to the lords full powers of working "the said mines and minerals, and carrying away the lead ore, lead, coals, ironstone, and fossils to be gotten thereout;" provided that the lords should keep the first stratum of earth "separate and not mix" it "with the lower strata." It was held, that, notwithstanding the use of the word lead ore and the subsequent words, the lord was entitled to stone common in the district, lying near the surface, and worked by quarrying from one of the allotments. *Micklethwaite* v. *Winter*[2] was a similar decision under an Inclosure Act of 1760.[3] It has been already seen that the nature of the transaction has frequently made it necessary to read the word minerals in a restricted sense.[4] In *Rosse* v. *Wainman* and *Micklethwaite* v. *Winter* a similar ground was relied on for reading it in an enlarged sense. A reservation to a lord in an Inclosure Act is construed more liberally than a similar reservation in an ordinary grant.[5] There is nothing in *North British Railway Co.* v. *Budhill & Co.*[6] which throws doubt on these cases.[7]

(δ) *Containing Chamber.*

Containing chamber.

A mere grant or exception of "minerals" will not comprise the chamber which incloses them. No doubt, according to the authorities, "mineral" cannot be confined in its meaning to the product of a mine:[8] but its meaning has never been so extended as to include anything more than what is merely the product of the earth. Where, therefore, the freeholder of land grants it excepting the minerals thereunder, and not

[1] 14 M. & W. 859; affirmed nom. Wainman *v.* Rosse, 2 Exch. 800.

[2] 6 Exch. 644.

[3] See also Darvill *v.* Roper, 3 Dr. 304; Brown *v.* Chadwick, 7 Ir. C. L. R. 106; Bell *v.* Wilson, 2 Dr. & Sm. 400; A.-G. *v.* Welsh Granite Co., 35 W. R. 618; Glasgow *v.* Farie, 13 A. C. 667; and cf. Hext *v.* Gill, 7 Ch. 712, 713.

[4] See *ante*, pp. 26, 27.

[5] See Rosse *v.* Wainman and Micklethwaite *v.* Winter, *sup.*, and see the cases cited in note 3.

[6] 1910, A. C. 116.

[7] See *ib.* at pp. 133–134, *per* Lord Gorell, p. 138 *per* Lord Shaw.

[8] See *ante*, pp. 18, 23.

excepting anything further, the chamber containing the minerals is comprised in the grant, and not in the exception; and the grantor has no interest whatever in the space or shell which his working creates.[1] However, an exception in such words as "all and sundry the coal and limestone" is equivalent to mines of coal and mines or quarries of stone;[2] and an exception in such words as "the whole coal stone quarries and all other metals and minerals within" has been said to mean the whole of the land under the surface.[3]

(ε) *Metal, Ore, Stones, &c.*

"Metal" is a word of less extensive meaning than "mineral." Metal.
"All metals are minerals, but all minerals are not metals."[4] "We understand by the term metal a firm, heavy, and hard substance, opake, fusible by fire, and concreting again when cold into a solid body, such as it was before, which is malleable under the hammer, and is of a bright glossy and glittering substance where newly cut or broken."[5]

The primary meaning of "ore" is, according to Johnson's Ore.
Dictionary, "metal" or "metal unrefined—metal yet in its fossil state;" and, according to Webster's Dictionary, "the compound of a metal and some other substance, as oxygen, sulphur, or arsenic . . . by which its properties are disguised or lost;" metals not so combined being stated to be called

[1] See Ramsay *v.* Blair, 1 A. C. 702, 704, 706; Met., &c., R. Co. *v.* Cosh, 13 Ch. D. 614, *per* Jessel, M.R.; Davis *v.* Treharne, *per* Brett, L.J.; a case which is not reported in the Court of Appeal, but is in the House of Lords: see 6 A. C. 460; Batten Pooll *v.* Kennedy, 1907, 1 Ch. at pp. 265, 266. The dictum of Jessel, M.R., in Met. R. Co. *v.* Cosh is a dictum as to s. 77 of Rail. Cl. Cons. Act, 1845, under which, however, mines, and not merely minerals, are deemed to be excepted: see *post*, p. 31, and see the section cited, *post*, p. 371. See also Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62; Eardley *v.* Granville, 3 Ch. D. 834, 835: cf. the meaning of mine, *ante*, pp. 5–7.

[2] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 166.

[3] See Ramsay *v.* Blair, 1 A. C. 703. In many Acts of Parliament or Rules thereunder "mineral" is expressly defined. See, *e.g.*, 21 & 22 Vict. c. 109, s. 8; 26 & 27 Vict. c. 49, s. 37; S. L. Act, 1882, s. 2; Land Tr. Rules, 1903, r. 1 (5). These definitions are mentioned in their proper places.

[4] See the definition of "mineral" in Johnson's Dictionary. See Rosse *v.* Wainman, 14 M. & W. 872; Bell *v.* Wilson, 2 Dr. & Sm. 399.

[5] Johnson's Dictionary. The derivation of the word from μετὰ τὰ ἄλλα is sanctioned by the Encyclopædia Metropolitana.

"native" metals. Webster's Dictionary also gives, as a secondary meaning, "the ore of a metal, with the stone in which it occurs, after it has been picked over to throw out what is quite worthless." "Ore" has also been said to mean metalliferous minerals obtained by smelting.[1] The meaning of the word "ore" in the Acts of W. & M., relating to Mines Royal, will be subsequently referred to.[2]

Stones. The word "stones" hardly seems to require a definition. Questions have, however, arisen under Navigation Acts whether particular substances were liable to toll as "stones," or as "merchandize."[3]

Fossils. The word "fossils" may apply to matters dug out of mines. But it may also, even in a strict sense, include stones dug in quarries.[4]

"Produce" of mines—coke. The expression "produce" of mines or minerals does not necessarily mean produce in its native state. Coke may be such produce, although by combustion its chemical nature is changed.[5]

"Stores and other effects." "Tap-cinder,"[6] thrown on the surface, and allowed to accumulate there, does not pass under a purchase of the stores and all other effects.[7]

Sect. 3.—"MINES" AND "MINERALS" IN RAILWAYS AND WATERWORKS CLAUSES ACTS.

Mining sections of the Acts. The mining sections of the Rail. Cl. Cons. Act, 1845,[8] and the Wat. Cl. Act, 1847,[9] are subsequently stated *in extenso*.[10] But it will be convenient to refer here to their principal provisions. The sections of the Rail. Cl. Act are headed by the words: "And with respect to mines lying under or near the

[1] Shaftesbury *v.* Wallace, 1897, 1 Ir. R. at p. 404.

[2] *Post*, p. 75. As to its meaning in Derbyshire, see pp. 558, 559 of the 3rd edition of this book.

[3] See Fisher *v.* Lee, 12 A. & E. 622; Dant *v.* Moore, 9 L. T., N. S. 381.

[4] See Rosse *v.* Wainman, 14 M. & W. 872, 873.

[5] See Bowes *v.* Ravensworth, 15 C. B. 518, 523. For the purposes of s. 3 of the Finance Act, 1901 (now repealed), "coal" included culm, coke, and cinders.

[6] See *ante*, p. 15.

[7] Boileau *v.* Heath, 1898, 2 Ch. 301.

[8] 8 & 9 Vict. c. 20.

[9] 10 & 11 Vict. c. 17.

[10] *Post*, pp. 371–379.

railway be it enacted as follows;" and those of the Wat. Cl. Act by the words: "And with respect to mines be it enacted as follows." Section 77 of the Rail. Cl. Act and section 18 of the Wat. Cl. Act provide, that the company or undertakers "shall not be entitled to any mines of coal, iron-stone, slate, or other minerals under any land purchased by them," except such parts "as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall" otherwise be deemed to be excepted out of the conveyance. It is then provided,[1] that notice shall be given by the owner of his intention to work "any mines or minerals;" that the company or undertakers may thereupon cause "such mines" to be inspected; and that, if the working of "such mines or minerals" be likely to damage the works, and they be willing to make compensation for "such mines," [2] he shall not work. Provision is then made [3] for the mode of working the said "mines," in case compensation be not made. The company or undertakers are then empowered to enter upon any lands in which "any such mines" are being worked to inspect the same.[4] And provision is then made under the Rail. Cl. Act [5] for the event of "any such mines" being worked contrary to the statute. The Rail. Cl. Cons. (Scotland) Act, 1845, contains provisions of a very similar kind.

Difficulty as to meaning—dicta and decisions.

The meaning of the words "mines of coal, ironstone, slate and other minerals" in section 77 of the Rail. Cl. Act, and section 18 of the Wat. Cl. Act, and in the corresponding provision of the Sc. Rail. Act, has given rise to as much difficulty as the meaning of the word "minerals," standing alone.[6] Indeed many of the attempts to define the word "minerals" were made as an initial step in the attempts to define the statutory words; and it was natural, therefore, that the conflict of judicial opinion, which appeared in the former,[6] should also appear in the latter. And if the history of the decisions and

[1] Rail. Cl. Act, s. 78; Wat. Cl. Act, s. 22.

[2] The Rail. Cl. Act adds the words "or any part thereof."

[3] Rail. Cl. Act, s. 79; Wat. Cl. Act, s. 23.

[4] Rail. Cl. Act, ss. 83, 84; Wat. Cl. Act, s. 26.

[5] S. 85. The Wat. Cl. Act contains no similar provision.

[6] *Ante*, pp. 11–24.

dicta as to the meaning of the word "minerals" is curious,[1] the history of the decisions and dicta as to the meaning of the statutory words is not less so. They may be said to cover three separate periods.

First period.

The first period was that prior to the year 1889. In *Great Western Railway Co.* v. *Bennett*[2] (1867), Lord Chelmsford, referring to section 77 of the Rail. Cl. Act, said: "That this section reserves to the mine owner all the minerals, however near they may be to the surface, unless the Company chooses to purchase them, appears very clearly from the exception of 'the parts necessary to be dug or carried away, or used in the construction of the Company's works,' as these will of course be the minerals lying nearest to the surface." In *Jamieson* v. *North British Railway Co.* (1868),[3] it was held, that freestone worked by an open quarry was excepted by the Scotch Rail. Act. In *Dixon* v. *Caledonian, &c., Railway Cos.* (1879),[4] a similar decision was arrived at as to limestone worked by open workings. In *Errington* v. *Metropolitan Railway Co.* (1882),[5] Jessel, M.R., said, "What are minerals probably within the meaning of the Act of Parliament are some beds of gravel, or some beds of clay, lying near the surface, and it is said they can only be worked from the surface." In *Midland Railway Co.* v. *Haunchwood, &c., Co.* (1882),[6] Kay, J., decided, that a bed of clay got by open workings was excepted by the Rail. Cl. Act. In *Hamilton* v. *North British Railway Co.* (1886)[7] it was held that common earth and sand (although minerals[8]) were not excepted by the Scotch Rail. Act. And in *Midland Railway Co.* v. *Miles* (1886),[9] a bed of clay got by open workings was assumed to be excepted.

Second period.

The second period was that between the year 1889 and the early part of the year 1909.

Glasgow *v.* Farie Mid. R. Co. v. Robinson.

It began with *Glasgow* v. *Farie* and *Midland Railway Co.* v. *Robinson;* both in the House of Lords. *Glasgow* v. *Farie*[10] (1889) was a Scotch appeal under the Wat. Cl. Act; and *Midland Railway Co.* v. *Robinson*[11] (1890) was an English appeal

[1] *Ante*, pp. 11–18.
[2] L. R. 2 H. L. 38.
[3] 6 Scot. Law Rep. 188.
[4] 5 A. C. 820 (see pp. 823, 824).
[5] 19 Ch. D. 571.
[6] 20 Ch. D. 552.
[7] 13 R. 461. Cf. see *ante*, p. 13.
[8] See *ante*, p. 13.
[9] 33 Ch. D. 632; see p. 642. The point was not argued.
[10] 13 A. C. 657.
[11] 15 *ib.* 19.

under the Rail. Cl. Act. Each case was decided by a majority. And the differences of opinion were not confined to the actual decisions. Their lordships differed upon almost every general proposition which led up to the decisions; and, when the majority agreed upon a proposition, they frequently differed upon the reasons. The actual decisions stand side by side, and the former is in no way overruled or qualified by the latter.[1] It is not surprising, however, that general propositions reached in such circumstances have not in all respects stood the test of time. At least one of them has been repudiated by its own author. Many of the others have been either overruled or disregarded in subsequent cases before the same tribunal. Indeed, if it were legally conceivable, it might be permissible to say that the principle upon which one of the points actually decided in *Midland Railway Co.* v. *Robinson* was based has been itself overruled.[2] Before referring to the decisions, it is desirable to summarize the general propositions.

Dicta therein —construction same in England, Scotland and Ireland.

(1) The Acts in question are to be construed in the same way in England, Scotland, and Ireland. Lord Halsbury in *Glasgow* v. *Farie*[3] reserved the right to reconsider the questions raised if they arose in England. The view above stated was, however, that taken by Lords Watson, Herschell, and Macnaghten in the same case.[4] And in *Todd, &c., Co.* v. *N. E. R. Co.*[5] Lord Halsbury stated that the view expressed by him in *Glasgow* v. *Farie* was not to be taken as an authority. *Glasgow* v. *Farie* was subsequently followed in cases under the English Rail. Act.[6] And the view above stated must now be taken to be settled.[7]

Irrelevancy of —decisions under private grants.

(2) The decisions as to the meaning of the word "minerals" in a private grant are of little (if any) importance in cases arising under the statutory words. Lord Halsbury in *Glasgow* v. *Farie*[8] thought them of great importance. Lord Watson

[1] See Todd, &c., & Co. *v.* N. E. R. Co., 1903, 1 K. B. 605, *per* Lord Halsbury; 608, 609, *per* Lord Alverstone.

[2] See *post*, p. 40.

[3] See 13 A. C. 671—673. Lord Ashbourne took the same view in Fishbourne *v.* Hamilton, 25 L. R. Ir. 521.

[4] See 13 A. C. 674, 682, 686: see also Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 560, *per* Kay, J.; Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 559, *per* Lord Esher; N. B. R. Co. *v.* Budhill, &c., Co., 1910, A. C. 116, 128, *per* Lord Gorell.

[5] 1903, 1 K. B. K. 605.

[6] See *post*, p. 41.

[7] See *post*, p. 43.

[8] See 13 A. C. p 672.

in *Glasgow* v. *Farie*,[1] and Lord Herschell in *Glasgow* v. *Farie*,[2] and *Mid. R. Co.* v. *Robinson*[3] were inclined to ignore them. Practically they were ignored. This view is not now maintainable.[4]

Little analogy with decisions under private grants.

(3) The reason for the view that the decisions upon private grants ought to be ignored, at all events so far as regards some of their Lordships, was the further view that there was "little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals but of the right to work them without giving support."[5] This view is not now maintainable.[6]

"Mines" qualifies subsequent words.

(4) The word "mines" in section 77 of the Rail. Cl. Act, and section 18 of the Wat. Cl. Act, qualifies all the subsequent words of the exception; and consequently those minerals only are included in it which constitute mines.[7] This was the view of Lords Watson, Herschell, and Macnaghten, and was probably the only conclusion in either case on which there was no disagreement. It is probable, although not certain, that it is still maintainable.[8]

"Mines" refers to stratification.

(5) The word "mines" means mineral substances lying in seams, beds, or strata. A "scattered piece of mineral" cannot be called a mine. This was the view of Lord Herschell,[9] and seems to be still maintainable.[10]

"Mines" not confined to underground workings.

(6) The word "mines" is used in the widest sense which can properly be given to it;[11] and it cannot therefore be confined to mines worked by underground workings. This was the view of Lords Watson and Herschell.[12] Lord Macnaghten differed.[13] Lord Macnaghten has himself in substance stated that the view of the majority must now be taken to be settled.[14]

[1] See 13 A. C. p. 675.
[2] See 13 A. C. at p. 681.
[3] 15 A. C. at p. 27.
[4] See *post*, p. 43.
[5] See Glasgow *v.* Farie, 13 A. C. 674, *per* Lord Watson: see also p. 671, *per* Lord Halsbury; 684, *per* Lord Herschell; Mid. R. Co. *v.* Robinson, 15 A. C. 27, *per* Lord Herschell: see also G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 41, *per* Lord Westbury; G. W. R. Co. *v.* Blades, 1901, 2 Ch. 624, 632—634, *per* Buckley, J.
[6] See *post*, pp. 43, 44.
[7] Glasgow *v.* Farie, 13 A. C. at pp. 676, 683, 686, 687.
[8] See *post*, p. 44.
[9] Mid. R. Co. *v.* Robinson, 15 A. C. 27.
[10] See *post*, p. 44.
[11] See, as to the secondary sense of mine, *ante*, pp. 2, 3.
[12] See *post*, pp. 35 *et seq.*
[13] See *post*, p. 37.
[14] See *post*, pp. 48–50.

It is hardly necessary to point out how largely the sixth proposition neutralises the fourth. The conflicting views as to the sixth proposition were supported by elaborate reasoning; to which it may be useful to refer.

Views of Lords Watson and Herschell.

The sections do not, said Lord Watson, except "mines and minerals;" but "mines of coal, ironstone, slate and other minerals."[1] It could not, Lords Watson and Herschell[2] thought, have been intended (as in cases before the Rating Act, 1874[3]) to distinguish between the different methods of getting; and to enact, that a mine, which would naturally be worked by open workings, should be taken and paid for at once, but that a mine, which would naturally be worked by underground workings, should not be taken and paid for until it was actually worked. The extent to which mines were sold or excepted would otherwise be left to depend upon the mode by which they might be found to be workable, or by which their owners might choose to work them at some future time. "Mines," said Lord Watson,[4] "must be taken to signify all excavations" (*i.e.*, whether surface or subterranean) "by which the excepted minerals may be legitimately worked and got."[5] He added, "It may be more accurate to say that the expression mines of coal, &c., is used by the legislature to denote the minerals in situ without reference to the manner in which they can be worked."[6] It follows, that, if any mineral clearly within the meaning of the sections (as, for example, coal, ironstone, or slate, which are expressly mentioned) crops out at any part of the surface taken for railway or waterworks purposes, and required in the ordinary course to be got by surface workings, such workings are "mines of minerals," and excepted accordingly.[7] Lord Herschell referred to an objection, which had been taken in argument, that, if the mine-owner were at liberty to work by surface operations, it would be open to him to remove the very thing which the company had bought, and so

[1] See Glasgow *v.* Farie, 13 A. C. 676; Mid. R. Co. *v.* Robinson, 15 *ib.* 33.

[2] Glasgow *v.* Farie, 13 A. C. pp. 678, 679, 683, 684, 685; Mid. R. Co. *v.* Robinson, 15 A. C. 19.

[3] *Post*, p. 572, n. [3].

[4] Glasgow *v.* Farie, *sup.* 678.

[5] It is presumed, that "legitimate" working means working according to the ordinary course of beneficial working in the locality.

[6] Mid. R. Co. *v.* Robinson, 15 A. C. p. 34.

[7] Glasgow *v.* Farie, *sup.* at pp. 678, 679, *per* Lord Watson.

directly interfere with the existence of the railway. He answered this by saying,[1] first, that the surface might be rendered just as unfit for railway purposes by subterranean workings; and, secondly, that precisely the same difficulty would arise whenever a mineral, ordinarily worked by underground operations, cropped out at or near the surface. He also took, by way of illustration, the case of a deep seam ordinarily got by underground workings, but (as in the case of a cutting or tunnel) forming the surface on which the railway rests. "Such a seam would be a 'mine' within the construction suggested" (*i.e.*, that mines were confined to subterranean workings) "and, therefore, reserved by the landowner, together with the right to work it; and yet the same question might be asked, can it have been intended that such owners should have the right to take away the surface upon which the rails are laid?"[2] He further called attention to the practical difficulties to which the contrary view would (he thought) give rise. In taking land it would be necessary to ascertain what minerals would not, according to the usual mode of working, be got by underground workings. Moreover, the question what mines were excepted might have to be determined many years afterwards by an inquiry as to the usual mode of working at the time of the conveyance; and in cases like that of slate, which is sometimes worked both from the surface and underground, an answer might be impossible.[3] Furthermore, if the suggested construction were right, it would (he thought) be necessary, in taking land, to ascertain what surface minerals lay under lands laterally adjoining such parts of the railway as would be injured if they were worked, and to purchase those minerals and the land under which they lay as a protection against such injury, as the provisions of section 78 as to giving notice and otherwise would not be applicable. The common law right to adjacent support is limited to that which the land required in its natural state; and this is all the Company would be entitled to apart from the implied right of support from adjacent land in the same ownership as that conveyed.[4]

[1] Mid. R. Co. *v.* Robinson, 15 A. C. 28, 29.

[2] Mid. R. Co. *v.* Robinson, 15 A. C. 29, *per* Lord Herschell.

[3] See *ib.*

[4] Mid. R. Co. *v.* Robinson, 15 A. C. 29, 30, *per* Lord Herschell. See *post*, pp. 304, 316 *et seq.*

Lord Macnaghten considered [1] that the word "mines" was used in what he held to be its ordinary signification of underground operations.[2] He accordingly thought, that the intention of the legislature was to distinguish between the different modes of working. "The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be, that slate mines are excepted, and that slate quarries are not, especially as the Rail. Cl. Acts make mention of slate quarries in another group [3] of sections." [4] The "minerals spoken of are minerals that are parts of mines." [5] Even if they were "minerals," the workings of them, being surface workings, could not (he thought) be "mines of minerals." "If [6] it was really the intention of Parliament, that all minerals, however worked, should be deemed to be excepted from conveyances to railway companies, unless expressly mentioned therein, I cannot conceive why the word 'minerals' is not to be found in the heading to this part of the Act; or why the word 'minerals' was not used in section 77 instead of the expression 'mines of coal, ironstone, slate, or other minerals;' or why the legislature in the heading, and in that section, avoided the use of the common, obvious, and well-understood expression 'mines and minerals.'" He also expressed an opinion, that the considerations which induced the legislature to provide, that mines worked by underground workings need not immediately be purchased, did not apply in the case of surface minerals; the existence of which in an unworked state was essential to the existence of the railway or waterworks, and the value of which was easily ascertained.[7]

View of Lord Macnaghten.

(7) The exception includes all minerals *ejusdem generis* with slate, in the sense of being worked by the same methods. This was the view of Lord Watson.[8] Lord Herschell differed. He thought that there was no common *genus* within which coal ironstone and slate could be comprised.[9] Lords Halsbury and

Application of doctrine of *ejusdem generis*.

[1] Glasgow *v.* Farie, 13 A. C., pp. 687 *et seq.*; Mid. R. Co. *v.* Robinson, *sup.* pp. 34, 35.

[2] *Ante*, p. 2.

[3] See s. 32: see *post*, p. 132.

[4] Glasgow *v.* Farie, *sup.* p. 688.

[5] Glasgow *v.* Farie, *sup.* pp. 691—692.

[6] Mid. R. Co. *v.* Robinson, 15 A. C. 35.

[7] Glasgow *v.* Farie, *sup.* pp. 697, 698.

[8] Glasgow *v.* Farie, *sup.* p. 657; Mid. R. Co. *v.* Robinson, *sup.* p. 33.

[9] Glasgow *v.* Farie, *sup.* pp. 683, 684. Cf. as to this Watson *v.* Whateley, 1 J. & H. 436.

Macnaghten expressed no opinion. Lord Watson's view is now in terms overruled.[1]

Element of "profit," or "use and value."

(8) The exception extends to "all such bodies of mineral substances lying together in seams, beds, or strata, as are commonly worked for profit, and have a value independent of the surface of the land;"[2] not meaning by that expression to confine it to value at the time of the purchase.[3] This was the view of Lord Herschell; and was based upon the definitions of the word "minerals" given by Mellish, L.J., in *Hext* v. *Gill*,[4] and by the Court of Appeal in *Jersey* v. *Neath Poor Law Union*;[5] to which reference has been already made.[6] This view is not now maintainable.[7]

Common clay, &c., not included in "mines."

(9) Common clay, sand, or gravel, which forms the upper soil, and is the ordinary soil of the district, is not within the exception; and the mere thickness of the stratum in question is for this purpose immaterial.[8]

View of Lord Watson.

Lord Watson was of this opinion, on the ground that the section only excepts mines "under any land purchased," and that the expression "land" cannot be restricted to vegetable mould and cultivated clay, but must include the upper soil.[9]

View of Lord Macnaghten.

Lord Macnaghten's opinion as to the meaning of the word "mines" involved concurrence with this view. He also relied upon sections 32 to 43.[10] He considered, that a purchase under section 42 would vest in the Company, as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, although not expressly purchased, and without any liability to work as the surveyor of the owner should direct; and that the expression "any land purchased" in section 77 included a purchase under section 42; and that this result would not be consistent with a construction of "mines" which would comprehend clay and gravel.[11] He also relied upon the

[1] See *post*, p. 47.

[2] Glasgow *v.* Farie, 13 A. C. 685.

[3] Mid. R. Co. *v.* Robinson, 15 A. C. 26, 27: see, as to this, *ante*, pp. 20, 21.

[4] 7 Ch. 699.

[5] 22 Q. B. D. 555.

[6] *Ante*, pp. 19—21.

[7] See *post*, pp. 46, 47.

[8] See Glasgow *v.* Farie, 13 A. C. 657. See also Hamilton *v.* N. B. Rail. Co., 13 R. 454.

[9] Glasgow *v.* Farie, 13 A. C. 679.

[10] See *post*, pp. 132, 133.

[11] Glasgow *v.* Farie, *sup.* 694—696. A conclusion directly opposite was reached from the same materials in Jamieson *v.* N. B. R. Co., 6 Sc. L. R. 188.

words in section 77 "except only such parts thereof as shall be necessary." He considered, that, if clay, stone, and gravel, which are ordinary materials for constructing or repairing, were intended to be included in "mines," the words "as shall be useful or proper" would have been found instead of the words "as shall be necessary;" and that, on the other hand, the Company would have been required to work such parts under the direction of the owner's surveyor.[1] He also thought, that this conclusion involved no hardship upon railway companies. It was argued, that, unless the word "mines" was held to include surface minerals, railway companies might be exposed to the risk of having the safety of their works endangered by the working of clay and gravel which laterally adjoined. But he thought the answer was, that railway companies must judge for themselves what extent of lateral land was required, and take sufficient to ensure the stability of their works.[2]

View of Lord Herschell.

Lord Herschell's opinion upon the sixth, seventh and eighth propositions led him to differ from Lords Watson and Macnaghten upon the ninth.[3]

Facts in Glasgow *v.* Farie.

The facts in *Glasgow* v. *Farie*[4] were as follows: The appellants, by virtue of the Waterworks Act, and a conveyance containing an exception of the "whole coal and other minerals in the land in terms of the Wat. Cl. Act, 1847," purchased from the respondent a parcel of land for the purpose of erecting waterworks. About two or three feet below the surface lay a seam of valuable brick clay. The respondent worked the same seam in the adjoining land to a depth of from twenty to thirty feet; and, having reached the appellant's boundary, claimed the right to work out the seam under the land purchased by the appellants. It was held,[5] reversing the decision of the Court of Session, that this seam was not included in the exception in the Act, and that the appellants were entitled to an interdict restraining the respondent from working it. This case in effect overruled the dictum in *Errington* v. *Metropolitan Railway Co.*, and the decision in *Midland*

[1] Glasgow *v.* Farie, *sup.* p. 689.
[2] *Ib.* 698.
[3] *Ib.* 679.
[4] 13 A. C. 657.
[5] *Per* Lords Halsbury, Watson, and Macnaghten, Lord Herschell dissenting.

Railway Co. v. *Haunchwood, &c., Co.* already referred to.[1]

Facts in Midland Railway Co. *v.* Robinson.

And in *Midland Railway Co.* v. *Robinson* [2] the facts were as follows: The appellants purchased certain land from the respondent's predecessor under the Rail. Cl. Cons. Act, 1845. The conveyance contained no special reference to mines or minerals. The respondent gave notice to the appellants of his desire to work certain beds of ironstone and limestone lying under the land purchased at depths varying from six to thirty-six feet. The ironstone and limestone could only be worked, and according to the custom in the district would be properly worked, by surface operations. The appellants brought an action to restrain the working so as to injure the railway. The House refused,[3] affirming the decision of the Court of Appeal,[4] to grant an injunction.

Observations on Mid. R. Co. *v.* Robinson.

It has since been said, that the only question argued in *Midland Railway Co.* v. *Robinson* was whether or not quarries of minerals, as well as mines of minerals, were within the exception in the Act.[5] So far as respects the limestone, the question whether it was within the exception was (it has since been said [6]) neither argued nor decided. However, this may be,[7] it was certainly assumed by the majority of the House that the limestone (as well as the ironstone) was within the exception; and the assumption was in accordance with the grounds stated by Lord Watson in support of the sixth and seventh propositions above mentioned,[8] and with the grounds stated by Lord Herschell in support of the sixth and eighth.[9] But that limestone is not in fact within the exception has since been, in principle, decided.[10]

Subsequent decisions and dicta during second period.

The following were the subsequent decisions and dicta during the second period: In *Ruabon, &c., Co.* v. *Great Western Railway Co.*[11] (1892), that (*a*) terra cotta clay, which came up nearly to

[1] *Ante*, p. 32.

[2] 15 A. C. 19.

[3] *Per* Lords Herschell and Watson, Lord Macnaghten dissenting.

[4] Mid. R. Co. *v.* Robinson, 37 Ch. D. 386, which affirmed the decision of Chitty, J.

[5] See N. B. R. Co. *v.* Budhill, &c., Co., 1910, A. C. 124—125, *per* Lord Loreburn.

[6] See *ib.* p. 125.

[7] See *ib.* pp. 128—129, *per* Lord Gorell.

[8] See *ante*, pp. 35–38.

[9] See *ib.*

[10] See *post*, pp. 45, 46.

[11] 1893, 1 Ch. 427.

the surface,[1] and (*b*) clay and gravel [2] were minerals under the English Rail. Cl. Act; in *Glasgow, &c., Railway Co.* v. *Bain*[3] (1893), that freestone was a mineral under the Scotch Railway Act: in *Edinburgh Trustees* v. *Clippen's Oil Co.*[4] (1898), that limestone was a mineral under the same Act: in *Great Western Railway Co.* v. *Blades*[5] (1901), that blue brick clay was not a mineral under the English Rail. Cl. Act: in *Todd, &c., Co.* v. *North Eastern Railway Co.*[6] (1903), that common clay was not a mineral under the same Act; in *North British Railway Co.* v. *Turners*[7] (1904), that common clay was not a mineral under the Scotch Railway Act; and in *Forth Bridge Railway Co.* v. *Dumfermline*[8] (1909), that whinstone was a mineral under the same Act. All the substances which were the subject of these decisions were the ordinary soil of the district in question. The Scotch decision in *Glasgow* v. *Farie*[9] was therefore followed in the English decisions in *Great Western Railway Co.* v. *Blades*,[5] and *Todd, &c., Co.* v. *North Eastern Railway Co.*,[6] and in the Scotch decision in *North British Railway Co.* v. *Turners*.[7] The Scotch decisions in *Glasgow, &c., Railway Co.* v. *Bain*,[3] *Edinburgh Trustees* v. *Clippens*[4] and *Forth Bridge Railway Co.* v. *Dumfermline*[8] are now overruled.[10]

Common clay forming lower soil.

It will be noticed that *Glasgow* v. *Farie* was only a decision as to common clay, sand, or gravel, when it forms the upper soil. It has been suggested that when the same substance forms the lower soil, it may be within the exception.[11] But this suggestion does not seem to be now maintainable.[12]

Ejusdem generis doctrine as applied in Glasgow, &c., R. Co. *v.* Bain.

It will be remembered, that, while, in *Glasgow* v. *Farie*, Lord Watson thought the *ejusdem generis* doctrine applicable, Lord Herschell differed; and Lords Halsbury and Macnaghten expressed no opinion.[13] In these circumstances the Lord Justice Clerk in *Glasgow, &c., Railway Co.* v. *Bain* said, that the doctrine appeared to have been applied in *Glasgow* v. *Farie*, on the ground that stone, like slate, was quarried, and was also

[1] See pp. 434, 441, 463.
[2] See p. 458.
[3] 21 R. 134.
[4] 25 R. 504.
[5] 1901, 2 Ch. 624.
[6] 1903, 1 K. B. 603.
[7] 6 F. 900.
[8] 1909, S. C. 493.
[9] See *ante*, p. 39.
[10] See *post*, p. 50.
[11] See Glasgow *v.* Farie, 13 A. C. 679, *per* Lord Watson; G. W. R. Co. *v.* Blades, 1901, 2 Ch. 624, 638, *per* Buckley, J.
[12] See *post*, p. 45; and see G. W. R. Co. *v.* Carpalla, &c., Co., 1909, 1 Ch. at pp. 231, 232, *per* Moulton, L.J.
[13] See *ante*, pp. 37, 38.

used for building purposes.[1] This, if correct, would certainly have been the high-water mark of the doctrine. But, like the case in which the observation was made, the observation itself was disapproved in *North British Railway Co.* v. *Budhill.*[2]

Mineral in one place not necessarily so in another.

It was said in *Great Western Railway Co.* v. *Blades,*[3] that the same clay might be a mineral within the statutory words in one district, and not in another ;[4] and this view accords with the most recent pronouncements.[5]

Relevancy of question of price.

It was said in the same case that, in order to ascertain whether a particular substance is a mineral, it is not legitimate to consider the price of the parcels conveyed ; with a view to proving that an excessive price must have been paid, if the substance in question was excluded ; but that the price may be regarded as a factor, in connection with the other facts, in deciding what was the nature of the transaction.[6]

No difference throughout Acts in meaning of "minerals."

It was said during the second period, that there is no ground for suggesting that the word "minerals" has a more extended meaning in the later sections of the Acts than in the earlier ;[7] and this view is unaffected by the most recent pronouncements.[8]

Lord Gorell's summary as to second period.

Lord Gorell, in reference to the decisions and dicta during the second period, and to other possible interpretations of the word "minerals" as used in the Acts, summarised them as follows :—

"These are : First, that the term 'minerals' includes everything except the vegetable surface, or everything except the mere surface which is used for agricultural purposes. Secondly, that it includes everything below the soil and subsoil. Thirdly, that it includes every substance which can be got from underneath the surface of the earth for the purpose of profit. Fourthly, that it includes all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit and have a value independent of the surface of the land. Fifthly, that the words 'other minerals' includes minerals which can reasonably

[1] 21 R. at p. 137.
[2] See 1910, A. C., at p. 139, *per* Lord Shaw.
[3] 1901, 2 Ch. 624.
[4] P. 638, *per* Buckley, J.
[5] See *post*, p. 47.
[6] G. W. R. Co. *v.* Blades, 1901, 2 Ch. 631, 639.
[7] Todd, &c., & Co. *v.* N. E. R. Co., *sup.* 605, 609.
[8] See *post*, pp. 43—48.

be said to be *ejusdem generis* with coal, ironstone, and slate, and that stone is *ejusdem generis* with slate. Sixthly, that these words are used in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce." [1] Lord Loreburn agreed with the correctness of this summary.[2]

Third period.

The third period of the decisions and dicta as to the meaning of the statutory words corresponds with the fourth period of the decisions and dicta as to the meaning of the word "minerals" standing alone; [3] and it includes the same cases; namely, *North British Railway Co.* v. *Budhill, &c., Co.*,[4] *Great Western Railway Co.* v. *Carpalla, &c., Co.*,[5] *Cal. Railway Co.* v. *Glenboig, &c., Co.*,[6] and *Symington* v. *Cal. Railway Co.*[7] Before dealing with the actual decisions, it may be useful to summarise the general propositions there laid down.

Dicta therein —position same in England and Scotland.

(1) Their lordships agreed with the view taken during the second period [8] that the position under the Acts is the same in England and Scotland.[9]

Relevancy of decisions under private grants.

(2) The old decisions upon private grants [10] are of the greatest importance in interpreting the statutory words, and best give them effect; and the latter ought therefore to be interpreted according to their ordinary meaning.[11] Their lordships therefore disagreed with the view taken, or at all events acted upon, during the second period.[12]

No inconsistency with such decisions.

(3) The latter view is in no way affected by the suggested absence of "analogy between a reservation of minerals, coupled with an obligation to support the surface, and a reservation not only of the minerals but of the right to work them without giving support." [13] No doubt a railway company is "not entitled to support from minerals, as an ordinary person would be. No doubt, also, it is an advantage to railway companies that on acquiring land for their enterprise they are not compelled to purchase minerals lying thereunder, and may wait and enjoy

[1] 1910, A. C. 130.
[2] *Ib.*, p. 125.
[3] *Ante*, pp. 16, 17.
[4] 1910, A. C. 116.
[5] 1910, A. C. 83.
[6] 1911, A. C. 290.
[7] 1912, A. C. 87.
[8] *Ante*, p. 33.
[9] N. B. R. Co. *v.* Budhill, &c., Co., 1910, A. C. 128, 135, *per* Lords Loreburn and Shaw.
[10] *Ante*, p. 11.
[11] N. B. R. Co. *v.* Budhill, &c., Co., *sup.* pp. 127, 128, 135, 136, 138, 140, *per* Lords Loreburn and Shaw.
[12] *Ante*, pp. 33, 34.
[13] See *ante*, p. 34.

the support until the mineral owner requires them either to purchase the minerals or to take the risk of forfeiting the support. But it seems to me that these circumstances do not affect the separate question. What in fact are the minerals so reserved?" [1] "I regret that I am unable to see the cogency or sufficiency of the presence or absence by law of a right to support of the surface as a rule or reason for differentiation or distinction as within the category of minerals reserved. . . . After notices served the subjacent support can be secured as of right." [2] Their lordships therefore disagreed with the view taken during the second period.[3]

"Mines" qualifies subsequent words.

(4) Their lordships apparently agreed with the view taken during the second period,[4] that the word "mines" in the exception qualifies all the subsequent words. Lord Loreburn, referring to *Midland Railway Co.* v. *Robinson*,[5] said: "But this case turned upon the question whether or not quarries of mineral, as well as mines of mineral, are reserved in the Act." [6] And referring to the purpose of section 70 of the Scotch Rail. Act, he said: "Minerals were not to be acquired except by express agreement. It would be more accurate to say that mines of minerals were not to be acquired, but this distinction need not be dwelt upon here." [7] And Lord Gorell, referring to *Midland Railway Co.* v. *Robinson*,[8] said "it still remains for consideration . . . to what extent the words 'mines of' limit or qualify the generality of the term 'minerals.'" [9] And referring to Lord Romilly's definition of the word 'minerals,' [10] he said: "To give this meaning to the words as used in the 70th section . . . would not give adequate effect to the use of the word 'mines.'" [11] And referring to the improbability that the Act intended to except such substances as common clay,[12] he added: This is emphasized by the use of the term 'mines.'" [13]

Necessary to have regard

(5) In considering the sections their lordships thought it

[1] N. B. R. Co. *v.* Budhill, &c., Co., 10 A. C. 126, 127, *per* Lord Loreburn.
[2] *Ib.*, pp. 137–8, *per* Lord Shaw: see generally pp. 136—138, *per* Lord Shaw.
[3] See *ante*, p. 34.
[4] *Ante*, p. 34.
[5] *Ante*, p. 40.
[6] 1910, A. C. 124–5.
[7] *Ib.* pp. 125–6.
[8] *Ante*, p. 40.
[9] 1910, A. C. 129.
[10] *Ante*, p. 19.
[11] 1910, A. C. 131.
[12] See *post*, pp. 45, 46.
[13] 1910, A. C. 134.

necessary to look at the purpose which was in view when the Acts were passed. In the case of railways the purpose was to enable a railway to acquire land and build a railway thereon to carry passengers and goods. Minerals, however, were not to be acquired except by express agreement. "The leading purpose" was "to lay the permanent way." "The object of the sections appears to have been to permit the establishment of a permanent way, and yet to allow landowners to retain the benefit of matters which might prove of exceptional value to them." [1] "It must be taken that, what the railway company intended to get, and the landowner intended to give was the land under the line; for the object was to give, not a wayleave, but a support. I say this speaking generally." [2] This view does not seem to have been presented during the second period; except perhaps by Lord Halsbury in *Glasgow* v. *Farie*. Its importance is obvious.

to leading purpose.

(6) They also thought that any provision inconsistent with the leading purpose should be construed strictly; and the exception should therefore be so construed. Even therefore if the word "minerals" should be widely construed in private grants, the statutory words "or other minerals" must, they thought, receive some limitation; and the proper limitation was to apply them to exceptional substances only.[3]

"Minerals" refers to exceptional substances which are also minerals in common parlance.

(7) Lord Loreburn thus applied the two preceding propositions to the concrete cases of sandstone, chalk, clay, granite and other rock forming the crust of the earth: "In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould with a right to lay rails upon it, and liable to be destroyed altogether unless the company chose on notice to buy the ordinary rock lying beneath it. . . . If the respondents are entitled to work this substance under this railway, the same must be true of chalk or clay, or granite, or any other rock which forms the crust of the earth. I am aware that there are expressions of

Result as regards sandstone, chalk, clay, &c.

[1] See 1910, A. C. 125–6, *per* Lord Loreburn; 129, *per* Lord Gorell.

[2] See 1911, A. C. 299, *per* Lord Loreburn.

[3] 1910, A. C. 126–7, *per* Lord Loreburn.

great judges favourable to such a contention. There are also other expressions in a diametrically opposite sense. Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House, from which there is no escape. There is no such decision." [1] Lord Gorell used similar observations. "The enumeration of certain specified matters tends to show that its object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone." [2]

Lord Loreburn's summary.

(8) Lord Loreburn summed up the above reasoning in the following observations: "In the first place . . . it is clear that by the words 'or other minerals' exceptional substances are designated. In the second place . . . in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow* v. *Farie*." [3] "If anything exceptional in use, character, or value was thereunder, that was reserved; provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the landowners." [4] These observations are the key to the meaning of the statutory words.

Consequent inapplicability of definitions of Lords Romilly and Watson.

(9) In these circumstances it is wrong for the purpose of construing the statutory words to apply Lord Romilly's definition of minerals,[5] even if that definition were correct as regards private grants.[6] And it is equally wrong to apply the definition [7] suggested, or possibly suggested, by Lord Watson in *Glasgow* v. *Farie*.[8]

And of those in Hext *v.* Gill, and Jersey *v.* Neath, &c., Union.

(10) The definitions in *Hext* v. *Gill* [9] and *Jersey* v. *Neath Poor Law Union*,[10] even if correct as regards private grants,[11] do not give sufficient effect to the specifications in the statutory words of coal, ironstone and slate. They are, moreover, open to the same objection as that applicable to private grants. And they are inconsistent with the decision in *Glasgow* v. *Farie*, that

[1] 1910, A. C. 126.
[2] *Ib.*, p. 134.
[3] 1910, A. C. The "test laid down" by Lord Halsbury was his lordship's adoption of the definition suggested by James, L.J., in Hext *v.* Gill.
[4] 1911, A. C. 299.
[5] *Ante*, p. 19.
[6] See *ante*, p. 23.
[7] *Ante*, p. 35; 13 A. C. p. 679.
[8] See 1910, A. C. 130, 131, *per* Lord Gorell.
[9] *Ante*, p. 19.
[10] *Ante*, pp. 20, 21.
[11] See *ante*, p. 23.

a seam of clay of considerable value was not within the exception.[1] Lord Herschell's adoption of these definitions was therefore disapproved.

Incorrectness of *ejusdem generis* doctrine.

(11) The *ejusdem generis* doctrine relied upon by Lord Watson in *Glasgow* v. *Farie* is in fact open to the objection pointed out by Lord Herschell in the same case. "Lead, copper, tin, salt, I presume, would be considered minerals; but can they be said to be *ejusdem generis* with coal, ironstone or slate?"[2]

Effect of establishing general exceptional character.

(12) As soon as the general exceptional character of a seam is established, it is immaterial either that the vernacular has a wider application than it would have if it were restricted to such seam; or that so small a proportion of it as one-fourth cannot be properly described as a "mineral."[3]

"Mineral" in one place not necessarily so in another—question one of fact in every case.

(13) It follows from the sixth and eighth proposition, that a substance, which in one place would be a mineral within the statutory words, is not so in another place. If, for example, fireclay is the ordinary subsoil at the place in question, it will not be excepted under the statutory words.[4] So, although it is seldom that freestone is likely to be regarded as a mineral within the statutory words, it may be so regarded in the particular circumstances.[5] The principle is that the exception must be so construed as not to "swallow up" the grant. The word "exceptional" is not used in an absolute sense, but relatively to the other constituents of the earth's surface in the district in which the question arises. The question in every case is therefore one of fact, however difficult it may be to determine it.[6] This proposition agrees with the view taken during the second period by Buckley, J.[7]

Effect of present-day meaning on previous transaction.

(14) The application of the foregoing propositions may be altered by evidence. If, for example, it were shown, that, at the time of the passing of the Act, or at the time of the conveyance, the statutory words were generally understood to include ordinary sandstone, the position would be different. But the burden of proof would be upon the person who alleged the fact.[8]

[1] See N. B. R. Co. *v.* Budhill, &c., 1910, A. C. 131–2, *per* Lord Gorell.

[2] See S. C. 132–3, *per* Lord Gorell: see also p. 139, *per* Lord Shaw.

[3] See Cal. R. Co. *v.* Glenboig, &c., Co., 1911, A. C. 299, *per* Lord Loreburn.

[4] See Cal. R. C. *v.* Glenboig, 1910, S. C., 962, 963, *per* the Lord President (Dunedin) and Lord Salvesen.

[5] Symington *v.* Cal. Ry. Co., 1912, A. C. p. 92.

[6] Cal. Ry. Co. *v.* Glenboig, *sup.* Symington *v.* Cal. Ry. Co., *sup.* pp. 92, 93.

[7] See *ante*, p. 42.

[8] See N. B. R. Co. *v.* Budhill, 1910, A. C. 134, *per* Lord Gorell.

Evidence of common meaning at the present day will raise the assumption that the meaning was the same "at the time of the sale unless sufficient ground was given for coming to a contrary conclusion." [1]

Pronouncements in G. W. R. Co. *v.* Carpalla, &c., Co.

(15) The foregoing statements are principally taken from the speeches in *North British Railway Co.* v. *Budhill, &c.*, and the judgments and speeches in *Cal. Railway Co.* v. *Glenboig* and *Symington* v. *Cal. Railway Co.* It remains to refer to the pronouncements in *Great Western Railway Co.* v. *Carpalla, &c., Co.*[2] Lord Macnaghten considered that the statutory words were equivalent to "mines and minerals." "It must, I think, be taken as settled beyond the possibility of doubt or question that the expression 'mines of coal,' ironstone, slate, or other 'minerals,' which occur in section 77 of the Railway Clauses Consolidation Act, 1845, is equivalent to the expression 'mines and minerals' in common use with conveyancers, and that 'such mines,' or, in other words, all mines and minerals, not expressly purchased by a railway company that purchases lands within or under which minerals may be found, may, in case the company has not agreed to pay compensation, be worked by the owner, lessee, or occupier thereof, complying with the statutory provisions applicable to the case, even though such working may interfere with the use of the railway and absolutely destroy the surface." . . . "Such being the law as explained in this House, the only question open on this appeal is a question of fact." [3] His lordship then proceeded to deal with the facts; one being that the china clay in question "was not part of the ordinary composition of the soil in the district; its presence was rare and exceptional." Lords Loreburn, Atkinson, Collins, and Shaw expressed their concurrence.[4]

Remarks on these pronouncements.

These pronouncements, if they stood alone, would have been most embarrassing. After many years of the difficulties caused by the language of the sections, assisted (it must be admitted) by *Glasgow* v. *Farie* and *Midland Railway Co.* v. *Robinson*, they appeared to have been removed, or at all events lessened, by *North British Railway Co.* v. *Budhill;* and, within a month after the judgment in that case, and with the apparent concurrence

[1] See Cal. R. Co. *v.* Glenboig, &c., Co., 1911, A. C. 299, *per* Lord Loreburn.

[2] 1910, A. C. 83.

[3] See p. 85.

[4] See p. 86.

of many of the lords who took part in that judgment, new difficulties were suggested. According to *Great Western Railway Co.* v. *Carpalla, &c., Co.* the meaning of the statutory words was simplicity itself. But where was it "settled beyond the possibility of doubt or question" that "such was the law as explained in this House"? It could only have been "explained" in *Glasgow* v. *Farie* or *Midland Railway Co.* v. *Robinson*, as these were the only cases prior to *North British Railway Co.* v. *Budhill* in which the question was even discussed. It was not in terms at all events "explained" in either *Glasgow* v. *Farie* or *Midland Railway Co.* v. *Robinson*. It seems clear that Lord Macnaghten's observations in *Great Western Railway Co.* v. *Carpalla, &c., Co.* referred to the judgments of Lords Herschell and Watson (who formed the majority in *Midland Railway Co.* v. *Robinson* [1]), as contrasted with his own dissenting judgment. Lord Macnaghten relied in that case on the fact that the legislature, in the heading to the sections, and in the sections themselves, "avoided the common, obvious, and well-understood expression, 'mines and minerals.'" [2] It does not, however, follow from this that the majority considered the legislature to have in effect used that expression. On the contrary, Lord Watson drew pointed attention in that case to the fact that the expression used in the sections was "mines *of* minerals," and not "mines *and* minerals." [3] And he did so repeatedly, and not merely in that case, but also in *Glasgow* v. *Farie*. In neither case did Lord Herschell express an opinion on the point. It is not possible, therefore, it is submitted, to say that the decision in *Midland Railway Co.* v. *Robinson* was on the footing that the statutory words were equivalent to "mines *and* minerals." The truth is, that, in both *Glasgow* v. *Farie* and *Midland Railway Co.* v. *Robinson*, Lord Macnaghten himself, as well as Lords Herschell and Watson, recognised that the word "mines" qualified all the subsequent words in the sections; [4] but at the same time that the majority in *Midland Railway Co.* v. *Robinson* held that the word "mines" in the sections could not be confined to mines worked by underground workings.[5] The latter pronouncement no doubt largely

[1] See *ante*, p. 40.
[2] See *ante*, p. 37.
[3] See *ante*, p. 35.
[4] See *ante*, p. 34.
[5] See *ante*, pp. 34, *et seq*,

qualified the former. But it did not make it nugatory. Lord Macnaghten's observations are, moreover, inconsistent with those of Lords Loreburn and Gorell in *North British Railway Co.* v. *Budhill*,[1] and with those of Lord Loreburn in *Cal. Railway Co.* v. *Glenboig*.[2] And are they consistent with his own reference in *Great Western Railway Co.* v. *Carpalla, &c., Co.*, to the fact that the presence of the clay was "rare and exceptional"?[3] If the statutory words were equivalent to "mines and minerals," would not the china clay have been excepted even if its presence had not been "rare and exceptional"? It seems probable that in expressing their concurrence in *Great Western Railway Co.* v. *Carpalla, &c., Co.*, Lords Loreburn, Atkinson and Shaw did not intend to do more than concur in the result. Indeed it seems doubtful (if it be permissible to suggest it of so great a judge) whether Lord Macnaghten meant all that he said. At all events in the subsequent case of *Cal. Railway Co.* v. *Glenboig, &c., Co.* Lord Loreburn spoke of the *Budhill* and *Carpalla* cases in terms [2] which are quite inconsistent with Lord Macnaghten's observations in the latter case; and Lord Macnaghten himself, as well as Lords Shaw and Robson, expressed his agreement with Lord Loreburn.

Facts in N. B. R. *v.* Budhill, &c., Co.—sandstone.

The facts in *North British Railway Co.* v. *Budhill, &c., Co.*,[4] were as follows: At various dates between 1869 and 1876 the appellants acquired from the respondents or their predecessors certain lands for the purposes of the railway undertaking. The conveyances applying to parts of such lands were granted in the terms of the Railway Clauses (Scotland) Act, 1845. Other parts were acquired under ordinary conveyances with the reservation of minerals expressed as "subject to and in terms of the provisions of" such statute. The lands contained sandstone which was worked by open workings. It was held, reversing the decision of the Court of Session,[5] that the sandstone was not a mineral within the statutory words.[6] This case in terms overruled [7] the decisions in *Jamieson* v. *North British Railway Co.* and *Forth Bridge Co.* v. *Dumfermline* already referred to,[8] and must be taken to have overruled the

[1] 1910, A. C. 116: see *ante*, p. 44.
[2] 1911, A. C. 299.
[3] Cited, *ante*, p. 48.
[4] 1910, A. C. 116.
[5] 1909, S. C. 277.
[6] Whinstone is in the same position as sandstone: see 1910, A. C. 139, *per* Lord Shaw.
[7] 1910, A. C. 133, 134, 139.
[8] *Ante*, pp. 32, 41.

decisions or dicta in *Glasgow, &c., Railway Co.* v. *Bain* and *Edinburgh Trustees* v. *Clippen's Oil Co.*, also already referred to.[1] And, whether or not it was "neither argued nor decided" in *Midland Railway Co.* v. *Robinson*,[2] that limestone was a mineral within the statutory words, it is certain, since *North British Railway Co.* v. *Budhill, &c.*, that no assumption that limestone was such a mineral will be made in any future case. And if so, *North British Railway Co.* v. *Budhill* must be taken to have also overruled *Dixon* v. *Cal. Railway Co.* already referred to.[3]

Facts in G.W.R. Co. *v.* Carpalla, &c., Co.

The facts in *Great Western Railway Co.* v. *Carpalla, &c., Co.*[4] were as follows: The appellants purchased lands in Cornwall, adjacent to and within which were deposits of china clay of considerable value. The usual and only beneficial mode of working it was by open working. The china clay was not part of the ordinary composition of the soil in the district. Its presence was rare and exceptional, and to utilise it a manufacturing process was necessary. It was held, affirming the decisions of Eve, J., and the Court of Appeal,[5] that the china clay was a mineral within the statutory words.

Facts in Cal. R. Co. *v.* Glenboig, &c., Co.

The facts in *Cal. Railway Co.* v. *Glenboig, &c., Co.*[6] were as follows: The appellants acquired lands for the purposes of their undertaking, subject to the exception in section 70 of the Railway Cl. (Scotland) Act, 1845. The lands contained two seams of fireclay which were in lease to the respondents; and they also contained common clay. Three-fourths of the lower seam of fireclay contained refractory substances, which made it valuable for the manufacture of bricks capable of resisting high temperatures; and which were minerals within the "vernacular." The fire-resisting quality and the value of the remaining fourth, and also of the whole of the upper seam of fireclay were considerably less. The evidence described the remaining fourth of the lower seam of fireclay, the whole of the upper seam of fireclay, and the common clay, as being also minerals within the "vernacular." It was held, affirming the decision of the Court of Session,[7] that the whole of the lower seam of fireclay was "minerals" within the statutory words.

[1] *Ante*, p. 41.
[2] See *ante*, p. 40.
[3] *Ante*, p. 32.
[4] G. W. R. Co. *v.* Carpalla, &c., Co., 1910, A. C. 83.
[5] S. C. 1909, 1 Ch. 218
[6] 1911, A. C. 290.
[7] 1910, S. C. 951.

Sect. 4.—SURFACE, SUBSOIL, LAND, CLOSE, TENEMENT, HEREDITAMENT, SOIL.

Surface.

"Surface," or superficies, *primâ facie*, means, of course, nothing more than the mere *vestimenta terræ*. No portion, therefore, of the actual surface of the earth will be included in "mine," "quarry," or "minerals."[1] And if the article in question in effect, although not actually, consists of the surface of the earth, it will not be included in any of those words. It has accordingly been decided, that an exception under an Inclosure Act in favour of the owner of land of "all mines, minerals, stone, and other substrata," with a right to enter the said lands "for the purpose of opening such mines, &c.," will not include brick earth, which forms part of, or by lying close thereto in effect forms part of, the surface.[2] "Surface" may, however, be used in a secondary sense to denote the whole of the soil down to the centre of the earth, except the mines;[3] or, as opposed to an underlying mine, the whole of the soil lying over such mine, whether such soil itself contains minerals or not.[4]

Subsoil.

"Subsoil" includes, *primâ facie*, all that is below the actual surface down to the centre of the earth.[5] It is, therefore, a wider term than "mines" or "quarries;" or even, it is submitted, than "minerals," when that expression is used in a legal sense.[6] And an exception of "coals and coal mines" will only comprise that portion of the subsoil which actually consists of mines of coal, and will not comprise any intervening or other strata.[7]

Land—generally.

"Land" or "lands" will, *primâ facie*, include mines[8] and

[1] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555, *per* Kay, J. In Bell *v.* Wilson (2 Dr. & Sm. 399), V.-C. Kindersley said, that mineral would include the mould or loam, which lies more immediately at the surface, and on which the verdure grows and thrives; *ante*, p. 19. As to the present-day meaning, see *ante*, pp. 22, 23.

[2] See Church *v.* Incl. Comms., 11 C. B., N. S. 664.

[3] See *post*, p. 227.

[4] See Humphries *v.* Brogden, 12 Q. B. 742.

[5] See Cox *v.* Glue, 5 C. B. 549.

[6] See Atkinson *v.* King, 2 L. R. (Ir.) 339: see *ante*, pp. 22, 23.

[7] See Ramsay *v.* Blair, 1 A. C. 704.

[8] Shep. Touch. 90; Campbell *v.* Leach, Amb. 747; Clegg *v.* Rowland, 2 Eq. 165, 166; Newcomen *v.* Coulson, 5 Ch. D. 142, 143; Smith *v.* G. W. R. Co., 3 A. C. 165, 180; *Re* Met., &c., R. Co. and Cosh, 13 Ch. D. 612; Errington *v.* Met. R. Co., 19 *ib.* 568, 569, 570, 573, 575, 578; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 333;

quarries ;[1] in fact, everything under the sky down to the centre of the earth.[2]

Contracts to redeem land tax.

And in contracts for the redemption of land tax the word "lands" must be construed as having its natural meaning, unless at the time of the redemption there is in existence a separate hereditament liable to be separately assessed. And, if there is such a hereditament, all the circumstances existing at the time of redemption must be looked at ; in order to see, whether the intention of the registered certificate was, that the surface only should be redeemed, or the land and everything beneath it.[3] It follows, that unopened seams of coal under land belonging to the same owner, in respect of which the land tax is redeemed, are included in the redemption.[4]

Pauper settlements—poor rates—lighting and watching.

But it is doubtful, whether a coal mine is "land" within the Pauper Settlement Act, 6 Geo. 4, c. 57, so as to enable an occupation of it to confer a settlement.[5] And "lands" do not include mines under the Poor Rate Act, 43 Eliz. c. 2.[6] Nor does "land" include coal mines under the Lighting and Watching Act, 1833.[7]

Close—tenement—hereditament.

"Close" is a word sufficiently wide to include both the surface and the subsoil.[8] So "tenement" or "hereditament" includes "mines."[9]

Soil.

"Soil," *primâ facie*, includes the surface and all that is below it down to the centre of the earth.[10]

Townley *v.* Gibson.

Thus in *Townley* v. *Gibson*[11] an Inclosure Act directed an allotment of part of the lands in question to be made to the

Holliday *v.* Wakefield, 1891, A. C. 81 ; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 112, 131 : see Thursby *v.* Briercliffe with Extwistle, 1895, A. C. 36, *per* Lord Herschell.

[1] See McDonnell *v.* McKinty, 10 Ir. L. R. 514, 521, 524.

[2] Pountney *v.* Clayton, 11 Q. B. D. 838.

[3] Newton, Chambers & Co. *v.* Hall, 1907, 2 K. B. 446.

[4] *Ib.*, *per* Bray, J., disregarding any dicta to the contrary in Met. R. Co. *v.* Fowler, 1892, 1 Q. B. 165.

[5] See R. *v.* West Ardsley, 4 B. & S. 95.

[6] See *post*, p. 572, n. [3].

See also Thursby *v.* Briercliffe with Extwistle, 1895, A. C. at p. 37, *per* Lord Herschell.

[7] Thursby *v.* Briercliffe with Extwistle, 1895, A. C. 32. See also *ante*, p. 31, as to the meaning of "land" in s. 77 of the Rail. Cl. Act.

[8] See Cox *v.* Glue, 5 C. B. 551.

[9] See Dunn *v.* Birmingham Canal Co., L. R. 8 Q. B. 47, 48 ; Errington *v.* Met. R. Co., 19 Ch. D. 568 ; Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 43.

[10] See Pretty *v.* Solly, 26 Beav. 612 ; Wakefield *v.* Buccleuch, 4 Eq. 624 ; Rolls *v.* St. George, 14 Ch. D. 796.

[11] 2 T. R. 701.

lady of the manor "in lieu of and as a compensation for her right and interest in and to the soil of the residue of the said common and waste grounds," and the residue to be allotted to the several tenants in fee, discharged from all customary tenures. The Act then contained a saving clause, reserving to the lord all seignories, rents, fines, &c., and all other royalties and manorial jurisdictions whatsoever. It was held, that the mines under the allotments made to the tenants were part of the soil; and were not, therefore, reserved to the lord. And the mere fact that the mines were in lease at the date of the Act was held to make no difference.[1]

Pretty *v.* Solly.

It may, however, appear from the context, that the word "soil" is not intended to have its primary meaning. Thus in *Pretty* v. *Solly*,[2] an Inclosure Act directed allotments for public and specified purposes, and that one-sixteenth should be allotted to the lord of the manor "in lieu of and in full compensation for his and their right and interest in and to the soil of the said waste lands," and that the remainder of the common lands should be divided amongst the commoners to be held in severalty. It was then declared, that the lord's seignorial rights were not to be prejudiced except as to the soil, and that the lord might thereafter enjoy all rents, heriots, &c., "and all mines, minerals, quarries, and other royalties," as if the Act had not passed. It was held, that the word "soil" was used as distinct from "land," and as equivalent to "surface;" and that the lord was entitled under the reservation to the mines under all the lands dealt with by the Act.

Buccleuch *v.* Wakefield.

In *Buccleuch* v. *Wakefield* [3] a local Inclosure Act recited that the Duchess of Buccleuch was Lady of the Manor, and as such was entitled to the "soil . . . of the commons and wastes, and to all mines, minerals, and quarries in or under the same." It then recited the general Act of 1801; which, enacted, that, so far as should not be otherwise provided in any special Act, lands of a manor sold to a purchaser for defraying the expenses of the Act should be discharged of all common and other rights "therein or thereon," and should be vested with purchaser in

[1] See also Micklethwaite *v.* Winter, 6 Exch. 644.

[2] 26 Beav. 606.

[3] L. R. 4 H. L. 377.

fee absolutely. The local Act then appointed a commissioner to put it into execution "with under and subject to such of the powers . . . provisions and directions contained in the General Act as were not repugnant to or controlled by or otherwise provided for" by the local Act. It then directed some of the lands in question to be sold in order to pay for the expenses of the inclosure. It then provided for an allotment to the Lord of the Manor as a compensation for his right and interest in the "soil." It also contained a clause expressly excepting all mines and minerals.[1] It was contended, that the provisions as to mines and minerals did not apply as to the lands directed to be sold. It was held in the Court below,[2] that such provisions applied to all the lands dealt with; and that the word "soil" ought therefore to be read in the secondary sense of "surface"; but the Judge (V.-C. Malins) stated, that his opinion would have been different, if the clause expressly excepting the mines had been absent. In the House of Lords, however, where the decision was affirmed, Lords Hatherley and Chelmsford based themselves on the ground, not merely of the express exception of mines, but of the preamble.[3]

SECT. 5.—OPEN AND NEW MINES AND QUARRIES.

Importance of distinction.

The difference between an open mine or quarry, and one which is new, is of general importance. It usually arises in cases between a tenant for life or years, and the remainderman or reversioner; either as regards the right to work,[4] or as regards the power to grant leases.[5] But it is not confined to such cases. It may arise in cases between a copyholder and his lord;[6] a parson and his successor;[7] or a mortgagor and his mortgagee.[8]

Generally.

To constitute an open or old mine[9] or quarry, there must have been a previous general dedication by a person acting within his lawful rights, for the purpose of making a profit from the produce.[10]

[1] 4 Eq. 613.
[2] 4 Eq. 613.
[3] See L. R. 4 H. L. 392, 404.
[4] *Post*, pp. 84 *et seq.*, 89 *et seq.*
[5] *Post*, pp. 181—192.
[6] *Post*, pp. 106—108.
[7] *Post*, pp. 110—112.
[8] *Post*, pp. 114—116.
[9] In strictness the word "mine," where an unopened mine is spoken of, appears to be used in a secondary sense: see *ante*, p. 2.
[10] See Coppinger *v.* Gubbins, 3 J. & L. 417; Elias *v.* Griffith, 8 Ch. D. 532,

Sales.

If the profit has been made by means of sales, it is clear, that the mine or quarry is open.[1] And where a general dedication for the purpose of profit and sale has been shown, the mine or quarry is open, although no profit may, in fact, have been made.[2]

Lease.

If the profit has been made by means of a lease, under which the lessee has actually worked, it is also clear, that the mine or quarry is open.[3] And it makes no difference, in such a case, whether the lessor has reserved a share of the profits, or has merely reserved a dead rent.[4] Indeed, although the lessee has never actually worked, the mine or quarry is open, if he has paid, or become liable to pay, a dead rent.[5] And an agreement for a lease is for this purpose equivalent to a lease.[6] Whatever the "owner in fee . . . would have taken as income . . . the person who has a right to the income is entitled to receive."[7]

Use.

Use is also a perception of profit. And if there has been a working and use of minerals, not limited to any special or restricted purpose, the mine or quarry is probably open.[8]

Working not essential.

Even, however, where the element of sale or lease is absent, an actual working is not essential. If a shaft or other development has been sunk or made, the mine intended to be worked by such development is open. And, if more than one mine are intended to be so worked, the mines, however many, intended to be so worked are open.[9]

nom. Elias *v.* Snowdon, &c., Co., 4 A. C. 454; Campbell *v.* Wardlaw, 8 A. C. 649, 650; Dashwood *v.* Magniac, 1891, 3 Ch. pp. 327, 328, 360, 361.

[1] See Elias *v.* Snowdon, &c., Co., 4 A. C. 461, *per* Lord Cairns, 465, *per* Lord Selborne. See also Coppinger *v.* Gubbins, 3 J. & L. 417, *per* Lord St. Leonards; Elias *v.* Griffith, 8 Ch. D. 532, *per* James, Cotton, and Thesiger, L.JJ.

[2] Elias *v.* Griffith, 8 Ch. D. 521, 532, 533: cf. Spencer *v.* Scurr, 31 Beav. 334.

[3] See cases cited in n. [1].

[4] In Elias *v.* Snowdon, &c., Co. (4 A. C. 454), the reservation was of a share of the profits, and Lord Cairns in his opinion (461) laid stress upon this fact. No opinion was, however, intimated by any of the Lords, that the actual decision would have been different, if the reservation had been by way of dead rent.

[5] Stoughton *v.* Leigh, 1 Taunt. 402; *Re* Kemeys-Tynte, 1892, 2 Ch. 215, *per* North, J. Elias *v.* Snowdon, &c., Co., 4 A. C. at p. 461, contains an apparent dictum of Lord Cairns to the contrary: "provided it be established, that any quarry was opened under the powers of that lease." But it was not necessary to determine the particular point mentioned in the text.

[6] *Re* Kemeys-Tynte, *sup.*

[7] *Ib.*

[8] Elias *v.* Snowdon, &c., Co., 4 A. C. 465, *per* Lord Selborne.

[9] Chaytor *v.* Trotter, 87 L. T. 33.

Question one of intention.

The question is one of intention in every case. It may be gathered from the fact of workings. But it may be also gathered from the extent of the developments ; from the putting up of plant of a known capacity ; from the facts that the mine in question is one of several included in one concern, and that the others have been actually worked ; or from the extent of the powers given to trustees under the settlement. *A fortiori* where actual declarations of intention have been made by the settlor.[1]

Dedication prior to settlement.

It is not necessary, in order that a mine or quarry may be open, that it should have been opened during the subsistence of the settlement, if the question arises under a settlement. If it was open at the date of the settlement, it does not cease to be open, merely because the settlor did not work it.[2]

Dedication subsequently to settlement.

On the other hand, it is not necessary that the person, whose acts are relied on as constituting an open mine or quarry, should be the settlor. If, for instance, there is a settlement of land containing unopened mines on one in tail, or for life without impeachment of waste, with remainder to another for life ; and the tenant in tail or for life in possession opens and works ; the remainderman will, on the death of the tenant in tail without issue and without disentailing, or on the death of the tenant for life in possession, be entitled to treat the mines as open.[3] In like manner where a settlement contains a power to work [4] or demise [5] a mine or quarry, and the power is exercised, the mine or quarry may become open. But it is otherwise if the power is merely contained in an Act for the purpose of facilitating the administration of the trust, such as The Trusts (Scotland) Act, 1867.[6]

No actual openings.

A mine or quarry is not, however, open, merely because the settlor has opened mines or quarries in other parts of the same

[1] Chaytor *v.* Trotter, *sup.*, *per* Vaughan Williams and Romer, L.JJ. Stirling, L.J., agreed except as to one seam out of the eight in question, as to which he doubted. See further, as to intention, *post*, p. 84.

[2] See Greville-Nugent *v.* Mackenzie, 1900, A. C. 83.

[3] See Clavering *v.* Clavering, Mosely, 223, 2 P. Wms. 389.

[4] Chaytor *v.* Trotter, 87 L. T. at p. 39.

[5] See Daly *v.* Beckett, 24 Beav. 114 ; Cowley *v.* Wellesley, 35 Beav. 638 ; Campbell *v.* Wardlaw, 8 A. C. 650 ; *Re* Kemeys-Tynte, 1892, 2 Ch. 215, 216.

[6] See Campbell *v.* Wardlaw, 8 A. C. 641.

estate.[1] And, where between two pieces of land belonging to a settlor there is a narrow strip of land belonging to other persons; and the same seam exists under all the lands; and a lessee under the settlor sinks a pit, and works the seam under one of the two pieces; the separate ownership of the intervening strip, and the consequent impossibility of working the seam under the other of the two pieces by the same pit, prevent the seam under the latter piece from becoming open.[2] And a mine or quarry or clay pit is not necessarily open, if, although preparations had been made for opening it, it has never in fact been opened.[3]

Restricted openings.

And a mine or quarry is not open, if, although openings have taken place, they can be shown to have been purely experimental.[4] And a mine or quarry is not open, if it has merely been worked or used for the purpose of supplying fuel or the means of repair to some particular tenement, or for some other definite and restricted purpose.[5] And a coal mine is not open on the mere ground that a permission has been given to tenants to scrape or scour for the coal at the places where it cropped out at the surface.[6] And a gravel pit is not open on the mere ground that a surveyor of highways has dug and carried away gravel thereout for public purposes.[7] And the mere facts that the surveyor was bound by statute, after taking the gravel, to slope down the ground; and was liable to penalties for not so doing; and that the owner was bound to enforce such penalties; and that these duties were neglected; will not constitute the pit an open pit.[8]

Wrongful openings.

A mine or quarry is not open, if the workings have been wrongful;[9] if, for example, they have been workings by a

[1] Campbell *v.* Wardlaw, 8 A. C. 647.

[2] *Re* Maynard's Estate, 1899, 2 Ch. 347.

[3] See Viner *v.* Vaughan, 2 Beav. 469, 470.

[4] Elias *v.* Snowdon, &c., Co., 4 A. C. 464, 465; Chaytor *v.* Trotter, *sup.* at p. 37.

[5] Elias *v.* Snowdon, &c., Co., 4 A. C. 459, 465.

[6] Stepney *v.* Chambers, W. N. 866, p. 4011.

[7] Huntley *v.* Russell, 13 Q. B. 572, 591. The dicta to the contrary in Ross *v.* Adcock, L. R. 3 C. P. 670, 671, cannot, it is submitted, be sustained.

[8] Huntley *v.* Russell, *sup.*

[9] Bartlett *v.* Phillips, 4 De G. & J. 421; Ross *v.* Adcock, *sup.* 665; Elias *v.* Snowdon, &c., Co., 4 A. C. 459; Eccles. Comms. *v.* Wodehouse, 1895, 1 Ch. 563, 564.

parson without the consent of the Ecclesiastical Commissioners, and there is no ground for presuming that they were commenced before the passing of the Acts known as the Restraining Acts.[1] *A fortiori*, a mine or quarry is not open if the workings have been workings by way of trespass by a stranger.[2]

New seam or shaft.

A new seam opened in an open mine, and capable of being worked by the old shaft, is itself an open mine.[3] And, where a mine or quarry is once open, the sinkimg of a new pit or shaft on the same seam or vein, or the breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or a new quarry.[4] However, a new seam, which is incapable of being worked by the old shaft, cannot be considered as an open mine.[5] And, where a mine has been open for the purpose of winning coal, to work a contiguous mine of lead or ironstone, by means of a new shaft, would probably be an opening of a new mine.[6]

Dormant mine or quarry.

It would seem that a dormant or abandoned mine or quarry is not open, where the previous working has been stopped with a view to the permanent advantage of the estate.[7] Where, however, the working of a mine or quarry has not been commenced merely because, at the prices ruling at the time, it would not pay to work it, it is not necessarily new.[8] And, where a previous working has been stopped merely from inability to carry it on at a profit, it would seem, that the mine or quarry may be considered open.[9] "A mine not worked for twelve months or two years before he" (the tenant for life) "became possessed of the property must still be

[1] 13 Eliz. c. 10; 13 Eliz. c. 20; 14 Eliz. c. 11; 14 Eliz. c. 14. See Bartlett *v.* Phillips, *sup.*; Ross *v.* Adcock, *sup.*; Eccles. Comms. *v.* Wodehouse, *sup.*: see also *post*, pp. 110—112.

[2] Elias *v.* Snowdon, &c., Co., *sup.*

[3] Spencer *v.* Scurr, 31 Beav. 334: see Chaytor *v.* Trotter, 87 L. T. 33.

[4] See Clavering *v.* Clavering, Mosely, 223, 2 P. Wms. 388; Bagot *v.* Bagot, 32 Beav. 517; Cowley *v.* Wellesley, 1 Eq. 659, 35 Beav. 639; Elias *v.* Snowdon, &c., Co., 4 A. C. 454, 466, Cf. Ferrand *v.* Wilson, 15 L. J. Ch. 41, 53; S. C. 4 Ha. 388; *Re* Maynard's Estate, 1899, 2 Ch. 347.

[5] *Re* Chaytor, 1900, 2 Ch. 804: see as to the Victoria seam, pp. 808, 809.

[6] Spencer *v.* Scurr, *sup.* 337. An inquiry will, if necessary, be directed to ascertain the purposes for which a new pit or shaft was sunk. For the form of such inquiry, see Bagot *v.* Bagot, Set. 545, 546.

[7] See Viner *v.* Vaughan, 2 Beav. 469, 470; Bagot *v.* Bagot, 32 Beav. 509, 517.

[8] Chaytor *v.* Trotter, 87 L. T. 33.

[9] Bagot *v.* Bagot, *sup.* See Baillie's Trustees *v.* Baillie, 19 R. 220.

considered to be an open mine. A mine not worked for a hundred years could not, I think, be properly so treated; and my present opinion is that a mine which had not been worked for twenty or thirty years from the loss of profit attending the working of it, but which, from the rise in price of iron and coal, had become remunerative, might" be considered open.[1] Accordingly mines or quarries were held not to have lost their character of open mines or quarries merely because they had not been worked for seventeen years,[2] or twenty years.[3]

[1] Bagot *v.* Bagot, *sup.*, *per* Lord Romilly. Cf. Stoughton *v.* Leigh, 1 Taunt. 410; Millett *v.* Davey, 31 Beav. 470, 471, 478.

[2] Greville-Nugent *v.* Mackenzie, 1900. A. C. 83.

[3] *Re* Chaytor, 1900, 2 Ch. 804, 808. An inquiry will, if necessary, be directed to ascertain the time during which, and the circumstances under which, a mine remained unworked. For the form of such inquiry, see Bagot *v.* Bagot, Set. 545, 546.

CHAPTER II.

PROPERTY AND POSSESSION—ACTS OF OWNERSHIP.

a.—PROPERTY—GENERALLY.

Admitted ownership of surface or mines.

Primâ facie, the owner of the surface, wheresoever situate in England or Wales, is entitled, *ex jure naturæ*, to everything beneath or within it, down to the centre of the earth, except mines of gold and silver.[1] And the principle of this rule applies, although the surface may have been acquired by prescription.[2] And where the residue of a long term is enlarged into a fee simple under the Act 44 & 45 Vict. c. 41, s. 65, the fee simple includes the fee simple in all mines and minerals, which at the time of enlargement have not been severed in right or in fact, or have not been severed or reserved by an Inclosure Act or award; whether the term was originally created without impeachment of waste or not.[3] Mere ownership of a specified mine or mines is no evidence, however, of ownership of the underlying mines.[4] And it cannot be said that, if a person is shown to be the owner of mines, his ownership of the surface is to be presumed.[5] A statement by the predecessor in title of a person who claims minerals, that the

[1] Case of Mines, Plowd. 336; Hodgkinson *v.* Fletcher, 3 Dougl. 33, 34; Curtis *v.* Daniel, 10 East, 274; Barnes *v.* Mawson, 1 M. & S. 84; Lewis *v.* Branthwaite, 2 B. & Ad. 443; R. *v.* Pitt, 5 B. & Ad. 571; Rowe *v.* Grenfel, Ry. & M. 398; Rowe *v.* Brenton, Conc. 315; Harris *v.* Ryding, 5 M. & W. 72; Acton *v.* Blundell, 12 *ib.* 354; Rogers *v.* Brenton, 10 Q. B. 49, 50; Cox *v.* Glue, 5 C. B. 548; Keyse *v.* Powell, 2 E. & B. 144; Smith *v.* Lloyd, 9 Exch. 574; Rowbotham *v.* Wilson, 8 H. L. C. 360; Bowser *v.* Maclean, 2 De G. F. & J. 419; Marshall *v.* Ulleswater Co., 3 B. & S. 748; Wakefield *v.* Buccleuch, 4 Eq. 624; Smith *v.* Darby, L. R. 7 Q. B. 722; Seddon *v.* Smith, 36 L. T., N. S. 169; Newcomen *v.* Coulson, 5 Ch. D. 142, 143; Taylor *v.* St. Helen's, 6 Ch. D. 274, 277; Atkinson *v.* King, 2 L. R. (Ir.) 339; Egremont Burial Board *v.* Egremont, &c., Co., 14 Ch. D. 160; Pountney *v.* Clayton, 11 Q. B. D. 838. As to mines of gold and silver, see *post*, pp. 73—77.

[2] Seddon *v.* Smith, *sup.*: cf. Walker *v.* Jeffreys, 1 Ha. 349.

[3] See the section. As to impeachment of waste, see *post*, p. 94.

[4] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 111, 131.

[5] See Tyrwhitt *v.* Wynne, 2 B. & Al. 554; Marshall *v.* Ulleswater, &c., Co., 3 B. & S. 748.

overlying surface was in other hands, is admissible in evidence against him.[1]

Presumption rebuttable.

However, the right of property in the surface and in the underlying mines may be shown to be in different hands.[2] Nothing is more common than to sell or demise a piece of land, excepting the mines; or to sell or demise a piece of land, excepting the surface; and the instrument of severance may be producible. And many Acts of Parliament have been passed severing the ownership of a surface from that of the underlying mines. The presumption as to ownership may, moreover, be rebutted by evidence of long actual separate enjoyment of the surface and the mines by different owners.[3] In like manner the different strata of the subsoil may be shown to be the subjects of different rights.[4] Where the surface and the underlying mines, or the different strata of the subsoil, are differently owned, they are "separate tenements with all the incidents of separate ownership."[5] And the mines or each stratum may be held in fee simple,[6] or fee tail,[7] or otherwise as in the case of surface property.[8]

b.—PROPERTY—ROADWAYS, WATERWAYS, AND SANITARY WORKS—RIVERS—SEA-SHORE AND SEA.

Highways generally—non-navigable rivers—canals.

The property in the mines under a public highway is, *primâ facie*, in the freeholder of the adjacent soil. "The king has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil. So do all the trees in it and mines under it, which may be extremely valuable."[9] And, where the adjacent soil on each side is

[1] See Crease *v.* Barrett, 1 Cr. M. & R. 919.

[2] Rich *v.* Johnson, 2 Str. 1142 (a case of a manor and the underlying mines); Rowe *v.* Grenfel, Ry. & M. 398; Hodgkinson *v.* Fletcher, 3 Dougl. 34; Harris *v.* Ryding, 5 M. & W. 72; Cox *v.* Glue, 5 C. B. 548; Keyse *v.* Powell, 2 E. & B. 144.

[3] See Humphries *v.* Brogden, 12 Q. B. 739: see also Rowe *v.* Grenfel, *sup.*; Curtis *v.* Daniel, 10 East, 273; Barnes *v.* Mawson, 1 M. & S. 84; Cox *v.* Glue, *sup.* As to the effect of acts of ownership, see *post*, pp. 77 *et seq.*

[4] Cox *v.* Glue, 5 C. B. 549.

[5] See Rowbotham *v.* Wilson, 8 E. & B. 142, *per* Watson, B.; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166: see also Seaman *v.* Vawdry, 16 Ves. 392; and cf. Guest *v.* East Dean, L. R. 7 Q. B. 337.

[6] See Stoughton *v.* Leigh, 1 Taunt. 402.

[7] See Port *v.* Turton, 2 Wils. 172.

[8] See *ib.*

[9] Goodtitle *v.* Alker, 1 Burr. 143,

differently owned, the property in the mines under the highway is, *primâ facie*, in each owner *usque ad medium filum viæ*.[1] So in the case of non-navigable rivers. The soil *usque ad medium filum aquæ*: and, accordingly, the mines lying beneath such soil; belong, *primâ facie*, to the adjoining freeholder. There is no analogy, however, between the case of a public highway, or the case of a non-navigable river, and the case of a canal; and the presumption of ownership *usque ad medium filum* does not apply to the case of a canal.[2] And when a railway is a boundary, it resembles a canal in that respect.[3] The soil in roads set out under an Inclosure Act, and with it the mines therein, belong, *primâ facie*, to the lord of the manor, and not to the owners of the adjoining inclosure.[4] But, where the allotments are expressly made in satisfaction of all former rights not expressly reserved, the position is different.[5]

General Highways Act.

The Gen. Highways Act,[6] after providing for the widening of narrow highways by purchasing ground from the adjoining owner, expressly saves to the owner of such ground all mines, minerals, and fossils lying under the same, which can be got without breaking the surface.[7]

Highway (Turnpike) Acts.

And the High. (Turnpike) Act, 3 Geo. 4, c. 126, after providing that, on the completion of a new road, the old highway is to be stopped up and the land sold, expressly reserves all mines, minerals, and fossils lying under the old road to the persons who would have been entitled to the same if the old road had continued.[8] So the High. (Turnpike) Act, 7 & 8 Geo. 4, c. 24, expressly reserves all mines of iron, tin, lead, copper, coal, and other minerals in or under any land to be used for any turnpike road to the persons who would have been seised of or entitled to the same in case the Act for making such road had not been passed, with liberty to dig for and

per Lord Mansfield. See also Baird *v.* Tunbridge Wells, 1894, 2 Q. B. 883.

[1] See Chamber Colliery Co. *v.* Rochdale Canal Co., 1895, A. C. 576, 577, 584, 585.

[2] Chamber Colliery Co. *v.* Rochdale Canal Co., *sup.*

[3] Thompson *v.* Hickman, 1907, 1 Ch. 550.

[4] See Seddon *v.* Smith, 36 L. T., N. S. 168, 169.

[5] See Haigh *v.* West, 1893, 2 Q. B. at p. 29.

[6] 5 & 6 Will. 4, c. 50.

[7] S. 82.

[8] S. 88.

work the same in the manner usual in the district, without doing damage to such road or any part thereof.[1]

Highway and Loc. Am. Act, 1878.

And the High. and Locom. Am. Act, 1878,[2] expressly reserves all mines and minerals of any description whatsoever under any disturnpiked road or highway, which has or shall become vested in any urban sanitary authority by virtue of section 68 of the Pub. Health Act, 1848, or section 149 of the Pub. Health Act, 1875, to the persons who would be entitled thereto in case such road or highway had not become so vested; and empowers such persons to work and get the same, as if the road or highway had not become so vested, doing no damage to the road or highway; and these provisions extend to the Isle of Wight and to South Wales.[3]

Railways, waterworks, sanitary works, etc.

A railway company, purchasing under the compulsory powers of the Rail. Cl. Cons. Act, 1845,[4] are not entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, "except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works," unless the same shall have been expressly purchased.[5] And the Wat. Cl. Act;[6] and (by reference to that Act) the Pub. Health Am. Act, 1883;[7] contain provisions substantially identical. The effect of these provisions is stated subsequently.[8]

Electric lighting.

The Electric Lighting Act, 1882,[9] provides, that nothing in the Act shall limit or interfere with the rights of any owner, lessee, or occupier of any mines or minerals lying under or adjacent to any road, along or across which any electric line shall be laid, to work such mines and minerals.[10]

Navigable rivers.

The bed of all navigable rivers up to high-water mark belonging, *primâ facie*, to the Crown,[11] the subjacent mines and quarries belong, *primâ facie*, to the Crown.[12]

[1] S. 18.

[2] 41 & 42 Vict. c. 77.

[3] S. 27. See Rolls *v.* St. George, 14 Ch. D. 794, 799.

[4] 8 & 9 Vict. c. 20.

[5] S. 77, cited *post*, p. 371. See G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 41; Dixon *v.* Cal., &c., Companies, 5 A. C. 829. As to General Acts incorporating the Rail. Cl. Act, see *post*, pp. 432, *et seq.*

[6] 10 & 11 Vict. c. 17, s. 18, *post*, p. 374.

[7] 46 & 47 Vict. c. 37, *post*, pp. 377—379.

[8] See *post*, pp. 225, 226.

[9] 45 & 46 Vict. c. 56.

[10] S. 33.

[11] Lyon *v.* Fishmongers' Co., 1 A. C. 673, 682.

[12] See The Crown Lands Act, 1866, 29 & 30 Vict. c. 62, s. 21. As to rivers in Cornwall, see *post*, p. 71.

Sea-shore—generally.

The Crown is, in general, entitled to that part of the sea-shore which extends from low-water mark up to the ordinary high-water mark.[1] And by ordinary high-water mark is meant the line reached by the average of medium high tides between the spring and the neap in each quarter of a lunar revolution during the whole year.[2] That part of the sea-shore, which extends from low-water mark up to ordinary high-water mark, may, however, be shown to belong to the adjoining owner.[3] That part of the sea-shore, which lies between ordinary high-water mark and the highest limit of the tide, belongs, *primâ facie*, to the adjoining owner.[4] The ownership of the sea-shore shifts to the Crown or to the adjoining owner, according as the sea encroaches or recedes by slow and insensible steps. But a rapid and perceptible alluvion belongs to the Crown.[5] And the mines beneath the sea-shore belong, *primâ facie*, to the adjoining owner or to the Crown according as the soil superjacent to such mines belongs to such owner or to the Crown.[6]

Sea-shore—Scotland.

The grant of a sea-shore in Scotland carries the mines under it, unless they have been already severed in title.[7] And, where acts of ownership are shown, the grant of a barony in Scotland carries the mines under the adjoining sea-shore.[8]

Sea—generally.

The Crown is entitled, *primâ facie*, to the soil of the sea adjoining the coast,[9] and in consequence to all the mines subjacent thereto.[10]

Sea—Scotland.

The law of Scotland is the same.[11] The Crown may, however, dispose of submarine mines in favour of a subject, although

[1] Lopez *v.* Andrew, 3 M. & R. 329, n.; A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. M. & G. 206, 4 De G. & J. 55, 73.

[2] A.-G. *v.* Chambers, A.-G. *v.* Rees, *sup.*

[3] Lopez *v.* Andrew, *sup.*; Calmady *v.* Rowe, 6 C. B. 861; A.-G. *v.* Hanmer, 27 L. J. Ch. 837; Constable *v.* Nicholson, 14 C. B., N. S. 230.

[4] A.-G. *v.* Chambers, A.-G. *v.* Rees, *sup.*

[5] A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. & J. 66 *et seq.*

[6] *Ib.*, 4 De G. M. & G. 206; 4 De G. & J. 73; Lopez *v.* Andrew, *sup.*: see A.-G. *v.* Chambers, 12 Beav. 159; The Crown Lands Act, 1866, 29 & 30 Vict. c. 62, s. 21. As to the sea-shore in Cornwall, see *post*, p. 71.

[7] Ld. Adv. *v.* Wemyss, 1900, A. C. 68, *per* Lord Watson.

[8] *Ib.* 60, 81, *per* Lords Herschell and Shand. As to acts of ownership, see *post*, pp. 77 *et seq.*

[9] A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. M. & G. 206.

[10] As to the sea near Cornwall, see *post*, p. 71.

[11] See Cuninghame *v.* Ayrshire, 22 R. 596; Ld. Adv. *v.* Wemyss, *sup.*, p. 66, *per* Lord Watson.

not so as to enable the latter, in working, to disturb the *solum*, or interfere with the rights of the public.[1] But the grant of a barony in Scotland bordering upon the seashore does not of itself carry the mines under the adjoining sea below low-water mark.[2]

c.—PROPERTY AND POSSESSION—REVERSIONS AND REMAINDERS—LIFE TENANCIES AND LEASEHOLDS.

Lands generally—property and possession.

Where lands are granted for life, leaving a reversion in fee simple vested in the grantor; or where lands are settled upon one for life, with remainder to another in fee simple or fee tail; the reversioner or remainderman has the general property and right of inheritance in the subsoil and in the mines or quarries which it may contain, as part of his right in respect of the entire *solum* from the surface down to the centre of the earth. But the tenant for life has the right of possession or temporary enjoyment, as part of his right in respect of the entire *solum* in like manner.[3] And the position of a tenant for years, or from year to year, or even of a tenant at will, is precisely similar in this respect to that of a tenant for life.[4] However, during the continuance of a statutory term under the Irish Act, 44 & 45 Vict c. 49, all mines and minerals, coals and coal pits, subject to such rights in respect thereof as the tenant under the immediately preceding tenancy was entitled to exercise, are exclusively reserved to the landlord.[5]

Mines or quarries—property and possession.

And the principles applicable to lands, which happen to contain mines or quarries, equally apply to mines or quarries themselves as a separate tenement. The lessee for years of a particular mine or quarry has the right of possession; while the reversioner has the right of property.

Minerals—property and possession.

And the same principles apply to minerals, so long as they remain unsevered and part of the inheritance.[6]

[1] Ld. Adv. *v.* Wemyss, 1900, A. C. 66, *per* Lord Watson.

[2] *Ib.* 60, 67, 81, *per* Lords Herschell, Watson, and Shand. As to the effect of a grant *infra fluxum maris*, see S. C. As to the effect of a grant of mines under "wastes," see *post*, p. 228.

[3] See Attersoll *v.* Stevens, 1 Taunt. 188, 193; Lewis *v.* Branthwaite, 2 B. & Ad. 437, 443, 445; Keyse *v.* Powell, 2 E. & B. 144.

[4] Lewis *v.* Branthwaite, *sup.*; Raine *v.* Alderson, 6 Scott, 698, 699; Keyse *v.* Powell, *sup.*

[5] S. 5.

[6] See Attersoll *v.* Stevens, 1 Taunt. 193, 198, 199.

Containing chamber—property and possession.

The rights of property and possession comprise respectively rights in respect of the chamber which incloses the minerals. As soon as a space or vacuum is created by the working of the minerals, the right of property in such space or vacuum becomes vested in the reversioner or remainderman, but the right of possession becomes vested in the tenant for life or years.[1] And the principles applicable to land, which happens to contain a mine or quarry, equally apply to a mine or quarry itself as a separate tenement. In the case, therefore, of a mining lease, strictly so called, as soon as the lessee by his working has created a space or vacuum, although the right of property therein becomes vested in the lessor, the right of possession becomes vested in the lessee.[2]

d.—PROPERTY AND POSSESSION—MANORIAL OR ENFRANCHISED OR INCLOSED LANDS.

Copyholds—property and possession.

The right of property in mines or quarries beneath or within the copyhold tenements of a manor is, in general, vested in the lord as having the freehold of inheritance in him.[3] But it may by immemorial custom be vested in a copyholder of inheritance; or for life, with power to renew or to nominate a successor.[4] A grant of copyholds, however, includes a grant of the subsoil, with all the mines or quarries therein contained, as part of the grant in respect of the entire

[1] See Lewis *v.* Branthwaite, 2 B. & Ad. 437; Keyse *v.* Powell, 2 E. & B. 144; in connection with Eardley *v.* Granville, 3 Ch. D. 826.

[2] See further, on this point, *post*, pp. 104, 105.

[3] Winchester *v.* Knight, 1 P. Wms. 406; Grey *v.* Northumberland, 17 Ves. 282; Bourne *v.* Taylor, 10 East, 189; Rowe *v.* Brenton, Conc. 313, 8 B. & C. 737, 3 M. & R. 133; Dearden *v.* Evans, 5 M. & W. 11; Lewis *v.* Branthwaite, 2 B. & Ad. 487; Keyse *v.* Powell, 2 E. & B. 132; Bowser *v.* Maclean, 2 De G. F. & J. 419; Hext *v.* Gill, 7 Ch. 713; Eardley *v.* Granville, 3 Ch. D. 826, 832; A.-G. *v.* Tomline, 5 Ch. D. 750, 762. Cf. Greenwich Hospital *v.* Blackett, 12 Jur. 151.

[4] See Scriv. Cop. 7th ed. 296; Salisbury *v.* Gladstone, 6 H. & N. 129. In the manor of Wakefield (Yorkshire) the mines and minerals belong to the copyholders: see Roe *v.* Vernon, 5 East, 62; Price *v.* Macaulay, 2 De G. M. & G. 343, 344; Dav. 2, p. 501, n. The same is apparently the case in the manor of Abercarne (Monmouth): see Keyse *v.* Powell, 2 E. & B. 132; Phillips *v.* Homfray, 6 Ch. 771: see, however, Moggridge *v.* Hall, Llanover *v.* Homfray, Phillips *v.* Llanover, 13 Ch. D. 380; 19 Ch. D. 224. As to the manor of Great Broughton, see Mawson *v.* Fletcher, 10 Eq. 212, 214, 219; 6 Ch. 91, 94.

solum from the surface down to the centre of the earth. The possession of mines or quarries beneath or within a copyhold tenement, and of the subsoil containing them, is, accordingly, as part of the entire *solum*, vested in the copyholder.[1] In fact, the right of a copyholder, who has always been regarded as at least a tenant at will, cannot, in this respect, be less than the right of an ordinary tenant at will.[2] The property in the minerals (as well as the mines or quarries) beneath or within a copyhold tenement is, in general, vested in the lord.[3]

Containing chamber—property and possession.

Upon a grant of copyholds; as upon an ordinary grant, excepting the underlying mines;[4] the grantor retains not merely the property in the underlying minerals, but the property in the chamber which incloses them. But the possession of such chamber, like the possession of the inclosed minerals, and of the subsoil generally,[5] becomes vested, *primâ facie*, in the copyholder.[6] As soon, therefore, as a space or vacuum is created by the working of manorial mines, the right of property in such space or vacuum remains in the lord, but the right of possession becomes vested in the copyholder.[7]

Exception of mines on surrender of copyholds.

This right of possession is an estate in the land;[8] and probably entitles the copyholder, on surrendering his copyhold, to except the mines.[9]

Customary freeholds—property and possession.

The right of property in mines or quarries beneath or within customary freeholds is in general in the lord, and the right of possession in the tenant.[10] Indeed, the fact that a tenant has no right of property in mines or quarries is often material in showing that his holding is that of a customary, and not of an ordinary, freeholder.[11] However, the right of

[1] See Player *v.* Roberts, Sir W. Jones, 243; Gilb. Ten. 327; Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; Bourne *v.* Taylor, *sup.*; Rowe *v.* Brenton, *sup.*; Whitechurch *v.* Holworthy, 4 M. & S. 340; Lewis *v.* Branthwaite, 2 B. & Ad. 444; Keyse *v.* Powell, *sup.*; Bowser *v.* Maclean, 2 De G. F. & J. 420; Eardley *v.* Granville, 3 Ch. D. 832; A.-G. *v.* Tomline, 5 Ch. D. 762.

[2] See Lewis *v.* Branthwaite, *sup.*; Keyse *v.* Powell, *sup.*: see *ante*, p. 66.

[3] See Hext *v.* Gill, 7 Ch. 712; A.-G. *v.* Tomline, 5 Ch. D. 762, 768.

[4] See *ante*, pp. 66, 67.

[5] See *sup.*

[6] Eardley *v.* Granville, 3 Ch. D. 833.

[7] See *ib.*

[8] *Ib.* 832.

[9] See Anglesea *v.* Hatherton, 12 L. J., N. S., Exch. 57, at pp. 60, 61, *per* Cresswell, J., and Parke, B.

[10] See Winchester *v.* Knight, 1 P. Wms. 406; Portland *v.* Hill, 2 Eq. 765, 777.

[11] See Brown *v.* Rawlins, 7 East, 409.

property in mines or quarries beneath or within customary freeholds may be shown to be in the tenant.[1]

Enfranchisements.

Where copyhold tenements are voluntarily enfranchised, the person who obtains the enfranchisement becomes entitled, *primâ facie*, in the absence of any enactment to the contrary, to the mines and quarries therein; the right of property in which becomes divested from the lord.[2] However, with respect to copyholds enfranchised under the Copyhold Act, 1894,[3] whether compulsorily or voluntarily, no enfranchisement can affect the rights of any lord or tenant to mines, minerals, pits, or quarries, or to any easements or rights incident to the working thereof, unless with the express consent in writing of such lord or tenant.[4]

Ancient demesne.

Mines in lands held in ancient demesne belong to the tenants, and not to the lord.[5]

Wastes.

The property in all mines and quarries beneath and within the waste or common of a manor is vested, *primâ facie*, in the lord as the freeholder thereof.[6] However, the right of property in mines or quarries beneath or within the waste may be shown to be in the tenants of the manor.[7]

Common field.

The soil of a common field, and consequently the mines beneath it, belong to the respective owners, and not to the lord.[8]

Inclosures.

Where an inclosure takes place, the right of property in the mines and quarries within the inclosure becomes vested, *primâ facie*, in the allottees of the surface, as such allottees.[9] However, upon the occasion of an inclosure, special provisions are usually made as to the property in the mines and minerals.[10]

[1] See Curtis *v.* Daniel, 10 *ib.* 273.

[2] See and consider Townley *v.* Gibson, 2 T. R. 701.

[3] 57 & 58 Vict. c. 46.

[4] S. 23.

[5] Merttens *v.* Hill, 1901, 1 Ch. at p. 853.

[6] See Filewood *v.* Palmer, 5 Vin. Abr. p. 8, s. 33; Mosely, 172; Melm. MSS. E. 53, Linc. Inn Library; Townley *v.* Gibson, 2 T. R. 705; Place *v.* Jackson, 4 D. & R. 318; Roberts *v.* Haines, 6 E. & B. 652; A.-G. *v.* Hanmer, 27 L. J. Ch. 840; Love *v.* Bell, 9 A. C. 289; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424, 426; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 308. Cf. Hoskins *v.* Robbins, 1 Vent. 123; nom. Hopkins *v.* Robinson, 2 Lev. 2.

[7] See Curtis *v.* Danie 10 East, 273.

[8] See Haigh *v.* West, 1893, 2 Q. B. at p. 29.

[9] See Townley *v.* Gibson, 2 T. R. 701, see p. 706; Doe *v.* Davidson, 2 M. & S. 175, 188, 190. See Ackroyd *v.* Briggs, 13 L. T., N. S. 521.

[10] See Doe *v.* Davidson, *sup.*

Inclosure Acts.

And with respect to land inclosed under the Inclosure Acts,[1] where the right to mines and substrata exists as property distinct from property in the surface, and compensation is not made therefor upon the inclosure, the inclosure does not affect the property in such mines and substrata, or any incidental rights or easements; and where any mines or substrata, or the right of searching for or getting the same, has been leased or agreed to be leased as property distinct from the property in the surface, with or without incidental powers over the surface, the inclosure does not affect the rights of the lessee.[2]

e.—PROPERTY—PARTICULAR LOCALITIES.

Cornish manors.

The possessions of the Duchy of Cornwall, granted to the Black Prince by Edward the Third,[3] formerly consisted in part of the seventeen assessional manors of Helston-in-Trigg, Penmayne, Tintagel, Restormel, Penlyne, Penkneth, Talskedy, Liskeard, Rillaton, Stoke Climsland, Trematon, Tewington, Tybesta, Moresk, Tywarnhaile, Helston-in-Kerrier, and Calstock. But the last six of these have been sold for the redemption of land-tax; with an exception, however, of the mines and metallic minerals thereunder.[4] The lands of these seventeen manors consist, or consisted prior to the Act 7 & 8 Vict. c. 105, partly of freehold tenements, partly of conventionary tenements, and partly of wastes.[5] The right of property in the mines and minerals under the freehold tenements has always belonged to the tenants.[6] The lord of the manor of Tywarnhaile Tyas, in Cornwall, claims title to a moiety of all tin mines, tin ore, tin dues, and tin toll under the demesne and conventionary lands of the assessional manor of Tywarnhaile; and the Duke of Cornwall claims title to a moiety of all like mines, ore, dues, and toll under the lands within the manor of Tywarnhaile Tyas; and the lord and the Duke are

[1] See *post*, pp. 175 *et seq.*

[2] 8 & 9 Vict. c. 118, s. 98.

[3] See Rowe *v.* Brenton, Conc. Introd. IX.; Crease *v.* Barrett, 1 C. M. & R. 921; preamble of 7 & 8 Vict. c. 105.

[4] See Rowe *v.* Brenton, Conc. Introd.; preamble of 7 & 8 Vict. c. 105, and schedules thereto.

[5] *Ib.*

[6] Rowe *v.* Brenton, Conc. 315. See also Crease *v.* Barrett, *sup.* 922. In the latter case the ancient answers of conventionary tenants of a manor were received in evidence against the freeholders of the manor.

empowered by agreement in writing, enrolled in the Duchy office, to determine all questions arising between them respecting such claims.[1] Subject to such right of the lord of the manor of Tywarnhaile Tyas, the Duke of Cornwall is entitled to all mines and metallic minerals under the conventionary or former conventionary lands of the unsold assessional manors; to all mines, minerals, stone, and substrata under the waste and other demesne lands of the same manors; to all mines and metallic minerals under the conventionary or former conventionary lands and former waste or demesne lands of the sold assessional manors; and to all mines, minerals, stone, and substrata under all other lands of the unsold manors, and all mines and metallic minerals under all other lands of the sold manors, which, by the award under the Act 7 & 8 Vict. c. 105, were determined to belong to the Duke.[2]

Cornish sea-shore, sea, and rivers.

All "mines and minerals" lying under the sea-shore between high- and low-water marks in Cornwall, and under estuaries and tidal rivers and other places (below high-water mark) even below low-water mark in Cornwall, are, as between[3] the King and the Duke of Cornwall, vested in the Duke in right of the Duchy.[4] But from these are excepted "mines and minerals" in land below high-water mark, which is parcel of any manor belonging to his Majesty in right of his Crown.[5] All "mines and minerals" below low-water mark under the open sea adjacent to, but not part of, Cornwall, are, as between the King and the Duke, vested in his Majesty in right of his Crown.[6] "Mines and minerals," for the above purposes,

[1] 11 & 12 Vict. c. 83, s. 2. See, before the Act, Curtis *v.* Daniel, 10 East, 273. It is understood that these questions have never been determined.

[2] 7 & 8 Vict. c. 105, ss. 53, 54; the schedules thereto, and the awards thereunder; 11 & 12 Vict. c. 83, s. 1. Where discrepancies exist between the schedules and maps annexed to the awards, they are to be settled by reference to the maps: 11 & 12 Vict. c. 83, s. 1. Rowe *v.* Brenton (Conc.; 8 B. & C. 737) had previously decided that copper ore raised from mines in the conventionary tenements of one of the sold assessional manors belonged to the Crown in right of the Duchy. As to Cornish and Devonshire Courts, Rights and Customs, see Chapter XIX. of the 3rd edition of this book.

[3] As to the construction to be placed on these words, see Penry *v.* Holmn, 2 Exch. D. 332.

[4] The Cornwall Sub. Mines Act, 1858, 21 & 22 Vict. c. 109, s. 1. See, as to the origin of this Act, R. *v.* Keyn, 2 Exch. D. 155, 156, 157, 199, 200, 201. The lines of high- and low-water marks are, if necessary, determinable by arbitration: see s. 7 of the Act.

[5] S. 1.

[6] S. 2.

include quarries, veins, or beds of stone, and substrata of any other nature, and the ground and soil in, upon, or under which such mines and minerals, quarries, veins, or beds of stone, and other substrata lie.[1]

Gloucestershire.

The Hundred of St. Briavels, in the county of Gloucester,[2] includes the Forest of Dean and several of the surrounding parishes.[3] The greater portion of the surface of the Forest belongs to the Crown.[4] The smaller portion is in private hands.[5] The surface of the Hundred, not within the Forest, belongs partly to the Crown; and is partly in private hands.[6] That portion of the surface of the Hundred, which belongs to the Crown, is partly inclosed and partly uninclosed. And in like manner that portion of the surface of the Hundred, which is in private hands, is partly inclosed and partly uninclosed.[7] With certain few exceptions,[8] all the mines and quarries of every description throughout the Hundred belong to the Crown.[9] The interests of the Crown are represented by the First Commissioner of Woods, as "Gaveller" of the Forest; or by his Deputy.[10]

Derbyshire.

The right of property in the mines and veins of lead ore in a district within the Hundred of High Peak, in the county of Derby,[11] called the King's Field, and in certain other parts of the same Hundred; and in a district within the Soke and Wapentake of Wirksworth or Low Peak, in the same county,

[1] S. 8.

[2] As to the Gloucestershire Rights and Customs, see Chapter XX. of the 3rd edition of this book.

[3] See Allaway *v.* Wagstaff, 4 H. & N. 683. As to the extent of the Hundred and Forest, see Wood, Laws of the Dean Forest, 4, 5, 12.

[4] Wood, 5, 6.

[5] *Ib.*; 1 & 2 Vict. c. 43, s. 68.

[6] Wood, 7; 1 & 2 Vict. c. 43, s. 68.

[7] See 1 & 2 Vict. c. 43, ss. 67, 68; Allaway *v.* Wagstaff, *sup.*; Wood, 170, 171. The wood known as the "Abbot's Wood," which formerly formed part of the Forest (see 33 Vict. c. viii.), continues uninclosed land within the Forest for the purposes of 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40: see 33 Vict. c. viii. s. 9.

[8] Wood, 7.

[9] See the preamble of 1 & 2 Vict. c. 43; Wood, 6, 7. Prior to the Act a Mr. William Ambrose claimed the right, as lord of the manor of Blakeney, to grant gales for quarries, and exact gale fees and rents, within the bailiwick of Blakeney in the Forest. This claim was expressly saved by the Act (s. 85); but its invalidity was subsequently established: see A.-G. *v.* Mathias, 4 K. & J. 579.

[10] 1 & 2 Vict. c. 43, s. 13. The deputy must be a person skilled in mining: *ib.* As to his salary, see s. 88.

[11] As to the Derbyshire Rights and Customs, see Chapter XXI. of the 3rd edition of this book.

called the King's Field; and in certain duties payable in respect of such mines and veins; is vested in the Crown, as part of the possessions of the Duchy of Lancaster.[1] The right of property in the mines and veins of lead ore in the manors of Ashford, Hartington, Peak Forest, Tideswell, Crich, Stoney Middleton and Eyam, Youlgreave, and Litton, in the same county; and in certain duties payable in respect thereof; is in the hands of various private persons.[2] The right of property in the land containing the mines, in respect of which the duties are payable, is in the hands of various other private persons.[3]

Isle of Man.

Under the Act of Settlement of the Isle of Man the right of property in the mines, quarries, and minerals in the customary estates of inheritance in the Island is vested in the Crown.[4] But the owners of customary estates of inheritance in the customary tenements in the Island are entitled by immemorial custom to the clay and sand therein; the custom having grown up with the tenures as one of their customary incidents, and not being incapable of having had a legal origin.[5]

f.—PROPERTY IN MINES ROYAL.

Crown presumptively entitled to common law.

The right of property in all mines of gold and silver within the realm, whether they be in the lands of the Crown or of subjects, is vested, *primâ facie*, in the Crown, by prerogative.[6] In fact, mines of gold and silver are properly called "mines royal," and mines of all other substances "base mines."

[1] See the preambles of 14 & 15 Vict. c. 94; 15 & 16 Vict. c. clxiii. See Arkwright *v.* Gell, 5 M. & W. 204; Arkwright *v.* Evans, 49 L. J. M. C. 82.

[2] See the preamble of 15 & 16 Vict. c. clxiii. There can be no doubt, that in each case the right of property, strictly speaking, extends to the mines as well as the duties; and, under certain circumstances, the mines may be forfeited to the owners of the duties: see p. 570 of the 3rd edition of this book.

[3] See 14 & 15 Vict. c. 94, sch. 1; 15 & 16 Vict. c. clxiii. sch. i.

[4] See Ballacorkish, &c., Mining Co. *v.* Harrison, L. R. 5 P. C. 49; A.-G. *v.* Mylchreest, 4 A. C. 294.

[5] A.-G. *v.* Mylchreest, 4 A. C. 294. See further as to the Isle of Man, p. 577 of the 3rd edition of this book.

[6] Case of Mines, Plowd. 336; Case of Saltpetre, 12 Rep. 12; A.-G. of British Columbia *v.* A.-G. of Canada, 14 A. C. 302; A.-G. *v.* Morgan, 1891, 1 Ch. 443, 455, 456. As to mines formerly belonging to the Bishop of Durham, see 6 & 7 Will. 4, c. 19, s. 1; 21 & 22 Vict. c. 45, s. 5.

And in the Case of Mines,[1] which was decided in the year 1568, it was laid down, that, if gold or silver was contained in base metal in the land of a subject, not merely the gold or silver, but such base metal also, belonged to the Crown by prerogative.[2] An opinion of counsel was, however, given in the years 1640—1641, that, if the gold or silver was not contained in the base metal to such an extent as to make it worth the cost of extracting it, the base metal belonged to the subject; and the law, as expressed in the Case of Mines, was subsequently partly relaxed in favour of the subject in accordance with this opinion.[3]

Acts of Wm. & Mary.

Further relaxations were effected by the Acts 1 W. & M. c. 30, and 5 W. & M. c. 6. The first of these Acts provided (section 4) "That no mine of copper, tin, iron, or lead shall "hereafter be adjudged, reputed, or taken to be a royal mine, "although gold or silver may be extracted out of the same." Section 2 of the second of them provided, that all owners of "mines within the kingdom of England, dominion of Wales, or "town of Berwick-on-Tweed, wherein any ore now is, or here-"after shall be discovered, opened, found, or wrought, and in "which there is copper, tin, iron, or lead, shall and may hold "and enjoy the same mine or mines and ore, and continue in "the possession thereof, and dig and work the said mine or "mines or ore, notwithstanding that such mine or mines or "ore shall be pretended or claimed to be a royal mine or royal "mines." And section 3 provided, that the Crown "shall and "may have the ore of any such mine or mines in any part of the "said kingdom of England, dominion of Wales, or town of "Berwick-upon-Tweed (other than tin ore in the counties of "Devon and Cornwall), paying to the proprietors or owners "of the said mine or mines wherein such ore is or shall be "found, within thirty days after the said ore is or shall be raised "and laid upon the banks of the said mine or mines, and "before the same be removed from thence," the different rates therein specified "for all ore washt, made clean, and merchantable," according as the mineral contained therein was copper, tin, iron, or lead; and in default of payment the mine

[1] Plowd. 336.

[2] See also A.-G. *v.* Morgan, 1891, 1 Ch. 443, 444, 455, 456, 458, 460.

[3] *Ib.*, 444, 456.

owner was authorised to sell and dispose of the ore to his own use.[1]

Object of Acts.

The object of the Acts is plain. It "is to secure to the subject the copper, iron, tin, and lead ores found in his soil, or the full value thereof as fixed by statute, and at the same time to secure to the Crown all the gold and silver, if it chooses to take it, paying the value of the copper, iron, tin, and lead ores which accompany it." [2]

Result of Acts in many respects plain.

In many respects the result of the Acts is equally plain. The Acts only deal with mines of copper, tin, iron, and lead. They do not deal with other base mines. They do not, for example, deal with mines of zinc, although blende, which is an ore of zinc, is very often highly auriferous.[3] The Crown cannot, moreover, be called upon to exercise its right of pre-emption until the ore has been "washt, made clean and merchantable." It is not, therefore, sufficient to offer it quartz rock in the rough, just as brought up from the mine.[4] Furthermore, it is probable that the obligation to "wash and make clean" is on the subject. But, however this may be, he cannot sell until after the Crown has made default, and the Crown cannot make default until the ore has been washed and made clean.[5]

Meaning of "ore."

It is not so easy to ascertain the precise meaning of the word "ore," as used in section 2 of the second Act. The dictionary meaning of the word is metal in combination with something else. In *Attorney-General* v. *Morgan*,[6] North, J., said [7] that this was its meaning in section 2; and that section 2 referred to a combination, of which copper, iron, tin, or lead formed a part. In the same case, Kay, L.J., said,[8] that it was, to say the least, doubtful, whether quartz rock, containing only one ounce of gold per ton of the rock, and an unremunerative quantity of base metal (which properly described the mine there in question) was "ore" within the meaning of the section, and that the section probably referred to "metal in its crude

[1] See also 55 Geo. 3, c. 134.

[2] A.-G. *v.* Morgan, 1891, 1 Ch. 450, *per* North, J.: see also 456, 457, *per* Lindley, L.J., 459, *per* Lopes, L.J.

[3] *Ib.* 447, 448, 458.

[4] *Ib.*, 450, *per* North, J.

[5] *Ib.*, 451, 452, *per* North, J.

[6] 1891, 1 Ch. 432.

[7] 449, 450.

[8] 461, 462.

state separated from the rock." It does not, however, seem essential to ascertain the precise meaning of the word, for the purpose of construing section 2.[1]

Other difficulties of construction.

And there may sometimes be a difficulty in saying whether a mine is a mine of copper, tin, iron, or lead within section 2. If, for example, the value of the gold and copper per ton of ore is nearly the same, and it will not pay to work for one of these metals without the other, it is difficult to say whether the mine ought to be called a gold mine or a copper mine.[2] There is usually, however, no difficulty in saying, whether a mine ought to be called a gold mine, or a mine of copper, tin, iron, or lead. If it is worked for copper, tin, iron, or lead, it is a mine of copper, tin, iron, or lead. It cannot be so described, if it is worked for nothing but gold.[3] And it is, for this purpose, immaterial if it in fact contains a small quantity of copper, tin, iron, or lead.[4] Any other construction would reduce the Act to an absurdity. It would make it impossible to give effect to the provisions as to the different rates specified in section 3 ; [5] and it would render meaningless the provisions in section 2, entitling the owner to "hold and enjoy," &c., and the provisions in section 3 giving the Crown the right of pre-emption.[6] It has been suggested, that, when it is, in fact, doubtful, whether the mine in question ought to be called a gold mine or a mine of base metal, the Court would probably be inclined to give the subject the benefit of the doubt.[7]

A.-G. *v.* Morgan.

Attorney-General v. *Morgan* [8] was decided in accordance with the conclusions already stated. The defendant in that case was working a mine near Dolgelly in Merionethshire as a gold mine. The mine also contained copper, iron, and lead, but in such small quantities as not to be worth working. The defendant contended that he was the owner of a mine in which gold ore was found, and in which were copper, iron, and lead ; and that he was, therefore, within the precise terms of section 2 of the second Act. It was, however, held, that the mine was

[1] Consider A.-G. *v.* Morgan, 1891, 1 Ch. at pp. 449, 450, 461, 462.

[2] A.-G. *v.* Morgan, 1891, 1 Ch. 463, *per* Kay, L.J.

[3] *Ib.*, 448, 449, 450, 458, 459, 462, 463.

[4] *Ib.*

[5] *Ib.*, 449.

[6] *Ib.*, 450.

[7] *Ib.*, 463, *per* Kay, L.J.

[8] 1891, 1 Ch. 432.

in substance a gold mine, and that the ancient prerogative of the Crown was therefore not affected by the Acts.

Presumption rebuttable.

The presumption that the right of property in mines royal is vested in the Crown may be rebutted by the evidence of ownership in a subject. A mine royal is not an incident inseparable from the Crown, but may be severed from it by apt and precise words.[1] And if the Crown has a mine royal in the land of a subject, and makes a grant of "mines" *simpliciter*, the mine royal will pass: for otherwise the grant would be without effect; the Crown, as such, not being entitled to the base mines in the land of a subject.[2] If, however, the Crown makes a grant of "mines" *simpliciter* in a piece of Crown land, and there are mines royal and base mines therein, the base mines only will pass: for the common intent of the grant is thereby satisfied.[3]

Lands in Colonies.

The principle, that a grant by the Crown of lands will not pass gold or silver mines therein, unless they are expressly granted, applies to a grant of lands in the Colonies.[4]

g.—PRESUMPTION OF PROPERTY OR POSSESSION—ACTS OF OWNERSHIP.

Generally.

The question, when the right of property or possession will be presumed, has a place in the law of mines of equal importance to that, which it has in other branches of the law. Indeed it is with reference to the effect to be attributed to acts of ownership that the question usually arises; and there can be no more emphatic act of ownership than the working of a mine or quarry. Sometimes conflicting claims are made to ownership, and are made without regard to the Real Property Limitation Acts. In some of such cases documentary evidence is absent, and acts of ownership may then be the only evidence available. In others it is present; but is old, and also ambiguous or obscure; and acts of ownership may then be the only means

[1] Case of Mines, Plowd. 336.

[2] *Ib.*, 337.

[3] *Ib.*; Case of Alton Woods, 1 Rep. 41 a (n.), 46 b; A.-G. of British Columbia *v.* A.-G. of Canada, 14 A. C. 295.

[4] See Woolley *v.* A.-G. of Victoria, 2 A. C. 163; A.-G. of British Columbia *v.* A.-G. of Canada, *sup.*; Esquimault & Co. *v.* Bainbridge, 1896, A. C. 561; Calgary, &c., Co. *v.* Rex, 1904, A. C. 565. As to mines royal in Scotland, and settlements by a Crown grantee of lands contained therein, see Breadalbane *v.* Jamieson, 2 R. 826.

of construing it. And, similarly, when the existence of an alleged custom is doubtful, acts of ownership may be the only means of proving it. At other times conflicting claims are made to ownership, and are made under the Acts. In cases arising under the Acts the effect of acts of ownership is the same as in cases not so arising, and in which documentary evidence is absent. The question when the right of possession will be presumed usually arises when one of two persons claims the right, and the other is a stranger. In some of such cases acts of ownership may be relied upon in a similar manner. In others an equitable right to possession may be relied upon.

When presumption will be made—generally.

Acts of taking minerals under parts of a single and undivided piece of land are evidence, from which a title to the minerals under the whole may be presumed; it being difficult, if not impossible, to show such acts in respect of every part.[1] It is easy to make this presumption when a right or colour of right is shown applying to the whole.[2] But it may also be made in favour of a wrong-doer.[3] In fact, if the acts of the person claiming title show such a possession as would have enabled him to maintain trespass against a stranger, that circumstance of itself stamps his possession as an adverse possession; in respect of which the Limitation Acts may commence to operate.[4] Rightful possession of one mine within tin-bounds has on similar grounds been held to be a sufficient possession of all the mines within them.[5] And so the taking actual possession of and working one of several seams comprised in the same grant is the constructive possession of the others.[6]

When presumption will not be made—generally.

The presumption of property will not, however, be made where the land in question is not a single and undivided piece, but consists of two pieces held under different titles;[7] or consists of two pieces divided by a third of substantial extent, in

[1] Barnes *v.* Mawson, 1 M. & S. 84.

[2] See Taylor *v.* Parry, 1 Scott, N. R. 576; Wild *v.* Holt, 9 M. & W. 672; Calmady *v.* Rowe, 6 C. B. 861; McDonnell *v.* McKinty, 10 Ir. L. R. 527. Cf. Davis *v.* Shepherd, 1 Ch. 410, 414–417, 420; Low Moor Co. *v.* Stanley Co., 33 L. T., N. S. 436, 34 *ib.* 186.

[3] See Thew *v.* Wingate, 10 B. & S. 714, n., 720, n., 721, n.; Smith *v.* Stocks, *ib.*, 701, 712.

[4] Thew *v.* Wingate, 10 B. & S. 714, n.: see p. 721, n., *per* Blackburn, J.

[5] See Doe *v.* Alderson, 1 M. & W. 212. As to tin-bounds, see p. 483 of the 3rd edition of this book.

[6] See Low Moor Co. *v.* Stanley Coal Co., 33 L. T., N. S. 436, 34 *ib.*, 186, 189.

[7] See Ld. Adv. *v.* Wemyss, 1900, A. C. 62, *per* Lord Herschell.

which the minerals are not claimed.[1] In fact, acts of ownership in other parts of the land in question are not receivable in evidence, until it is first shown, that it forms part of one entire piece to which those acts are applicable.[2] And in the case of a grant, where the limits of the grant are defined, it is impossible by an act of ownership within the limits to found a claim to prescriptive possession outside them.[3] And the acceptance of a lease of mines on behalf of an infant, and the adoption of such lease by him when he attains majority, preclude him from contending that he has acquired a title to the same mines by presumption of law.[4] And there is a distinction between a possession which may establish a new and adverse right, and one which may construe or explain an antecedent grant. A more liberal effect is given to partial acts of possession as evidencing proprietary possession of the whole in the latter case than in the former.[5]

Wrongful possession.

And physical possession by a wrong-doer of part of a mine or vein does not create any conclusive presumption of his possession of the whole.[6] Where, indeed, the entry into possession is wrongful, a title can, in general, be only acquired in respect of the part of which actual physical possession has been taken. A wrong-doer cannot, by merely having worked for more than 12 years from his own mine into that of his neighbour, and without more, claim a title to his neighbour's mine under the Limitation Acts.[7] And where a man enters on and takes possession of one seam of coal, and by lapse of time acquires a title to it, the law will not, from those facts only, presume that his possession extends to all the other seams of coal lying under that particular one.[8] In fact, as a general rule, constructive possession of a wider area, whether vertical or horizontal, than that of which actual possession has been enjoyed, will only be inferred from actual possession of the limited area if the inference is necessary to give effect to contractual

[1] *Ib.*, 70, 71, *per* Lord Watson.

[2] Tyrwhitt *v.* Wynne, 2 B. & Al. 554.

[3] See Ld. Adv. *v.* Wemyss, 1900, A. C. at pp. 62, 70, 71.

[4] Ld. Adv. *v.* Wemyss, 1900, A. C. 48.

[5] *Ib.*, at pp. 67, 68, 70, 81.

[6] See McDonnell *v.* McKinty, 10 Ir. L. R. 527; Thew *v.* Wingate, 10 B. & S. 721, n.

[7] McDonnell *v.* McKinty, *sup.*; Dartmouth *v.* Spittle, 19 W. R. 444, 445; Ashton *v.* Stock, 6 Ch. D. 719, 726; Thompson *v* Hickman, 1907, 1 Ch. 550.

[8] See Low Moor Co. *v.* Stanley Co., 34 L. T., N. S. 186, 189.

obligations, or to preserve the good faith and honesty of a bargain.[1]

Acts sufficient to raise presumption—Thew *v.* Wingate—Smith *v.* Stocks.

Thew v. *Wingate* [2] is an example of the acts which will suffice to raise a presumption of property. There, under an Inclosure Act, an allotment (called No. 158) of land containing a gravel pit was made to surveyors of highways for repairing purposes; and adjoining lands were allotted to another person. The surveyors obtained gravel from No. 158 down to the year 1813; but thenceforth until 1858 they never entered or exercised any right thereon. In 1813 the adjoining allottee built a cottage and barn, and other buildings, on part of No. 158, and inclosed part of it with a fence. About the same time he cut off a corner of it; and he thereafter used such corner with part of his own allotments as one entire arable field. In 1814 or 1815 he cleared out the pit, and converted it into a pond. It was held, that the acts of the adjoining allottee, being acts of ownership in parts of the subsoil of a single and undivided piece of land, were evidence that he had taken possession of the whole; that such possession would have enabled him to maintain trespass against a stranger for meddling with the subsoil; and accordingly that he had acquired a title against the surveyors. In *Smith* v. *Stocks* [3] a similar case was similarly decided.

Acts not sufficient—Glyn *v.* Howell.

Glyn v. *Howell* [4] is an example in the other direction. There the plaintiffs were entitled to an undivided one-sixth of the mines under a mountain of 92 acres. The defendant was admittedly entitled to another undivided one-sixth. More than twelve years before the commencement of the action the predecessors in title of the defendant, under licences from the owners of the other four-sixths, but without the licence of the plaintiffs, had commenced to work out the upper seams of coal under the mountain from an area of two acres, and had remained in possession of that worked-out area. It was held, that, although the defendant had acquired a good title under the Statute of Limitations to the upper seams in the two-acre area, he had not acquired any title either to the lower seams in that area, or to any of the seams in the remainder of the 92 acres.

[1] Glyn *v.* Howell, 1909, 1 Ch. 606: see p. 678, *per* Eve, J.

[2] 10 B. & S. 714, n.

[3] 10 B. & S. 701.

[4] 1909, 1 Ch. 666.

A similar question sometimes arises in the case of licences,[1] whether the particular acts relied on amount to, or fall short of, a taking of possession. Possession under licences.

In the case of submarine mines, there is more difficulty in presuming property than in other cases.[2] With respect to submarine mines, Lord Watson, in a case from Scotland,[3] suggested further questions to the following effect :—(1) Will prescription by partial working of submarine mines, under a general grant of a barony, give the grantee a title to all the minerals capable of being continuously worked from his lands ? If so, (2) will the partial working of one seam be regarded as proprietary possession of all the seams workable from such lands ? And (3) how far seawards, in the case of an estuary, will a prescriptive right of working acquired by mining close to the foreshore extend ?[4] It was not necessary to decide these questions ; and Lord Watson did not decide them. If it had been necessary, it seems probable that he would have decided all of them adversely to the grantee.[5] Questions similar to the above or some of them might of course arise in England. Submarine mines.

In determining whether a right of property may be presumed, the following factors have usually to be considered :—(1) The character and position of the land in question ; (2) the number and extent of the workings ;[6] (3) the question of *bona fides* ; and (4) the question whether the workings were open or secret. There is an obvious difference in the latter respect between the case of a mine and that of a quarry. Factors to be considered.

Acts of ownership are frequently invoked for the purpose of proving the existence and nature of an alleged custom as to mines ; manorial[7] or otherwise.[8] They have also been made available, with success, for the purpose of establishing concurrent manorial customs ; one in favour of the lord as to one Alleged custom.

[1] See *post*, p. 73.

[2] Ld. Adv. *v.* Wemyss, 1900, A. C. 71, *per* Lord Watson.

[3] Ld. Adv. *v.* Wemyss, 1900, A. C. 48.

[4] See p. 69.

[5] See pp. 67, 68 : and see p. 81, *per* Lord Shand.

[6] See A.-G. *v.* Chambers ; A.-G. *v.* Rees, 4 De G. & J. at p. 65.

[7] See Hanmer *v.* Chance, 4 De G. J. & S. 630, 635 ; Portland *v.* Hill, 2 Eq. 765 ; Warrick *v.* Queen's Coll. Oxford, 6 Ch. 716, 722 ; Betts *v.* Thompson, *ib.*, 736 ; Heath *v.* Deane, 1905, 2 Ch. 93.

[8] See A.-G. *v.* Mathias, 4 K. & J. 579.

class of mines, and the other in favour of the tenants as to another.[1] Of course, if the alleged custom could not have a legal foundation, acts of ownership are immaterial.[2]

Keyse *v.* Powell.

Where B. became tenant from year to year of a close containing an unopened mine, and entered into occupation of the surface; and in 1821, pending the tenancy, the lessor demised the mine as a separate tenement to B. and P.; and in 1832 B.'s tenancy from year to year ceased; and no working took place until 1847; it was held, that, before 1821, B. had been in possession of the mine; that by the demise in 1821 he became possessed without actual entry; that such possession enured for the benefit of B. and P.; and that, accordingly, B. and P. were both in possession from 1821, and did not hold a mere *interesse termini*.[3]

Davis *v.* Shepherd—equitable title.

A person in actual physical possession of part of a mine or vein, who has an agreement for a lease of the whole, and who can compel the lessor to perform it, will be treated as constructively in possession of the remainder:[4] although, whether such possession will, at law, constitute a tenancy from year to year, appears doubtful.[5]

Possession for rating purposes.

A person who has a licence to work a whole mine or quarry, and who enters on a part, is, for rating purposes, in occupation of the part only.[6]

[1] See Curtis *v.* Daniel, 10 East, 273.

[2] See A.-G. *v.* Mathias, *sup.*

[3] Keyse *v.* Powell, 2 E. & B. 132, 146.

[4] Davis *v.* Shepherd, 1 Ch. 415.

[5] See p. 420.

[6] R. *v.* Fayle, 27 L. T. 64. See also *post*, pp. 578-9. As to licences, see *post*, pp. 269 *et seq.*

CHAPTER III.

WORKINGS AND USER FOUNDED ON PROPERTY OR POSSESSION—ORDINARY TENANCIES IN FEE OR FOR LIFE OR YEARS OR AT WILL—REVERSIONS AND REMAINDERS—TRUSTEES.

a.—WORKINGS—TENANT IN FEE.

Generally.

An ordinary tenant in tail in possession is entitled, as between himself and his successor in title, to open and work all mines and quarries beneath and within his lands; and to dispose freely of the produce.[1] A tenant in fee simple in possession, subject to an executory devise over, is, *primâ facie*, dispunishable for legal waste.[2]

Lunatic tenant in fee simple.

Where such a course is for the benefit of a lunatic tenant in fee simple, his personalty will be laid out under the sanction of the Court in expenses incident to the working of his open[3] mines or quarries, as, for instance, in the erection of a fire engine; and, in sanctioning it, the Court will pay no regard to the interest of his heir on the one hand, or of his personal representative on the other.[4]

[1] See the timber case of A.-G. *v.* Marlborough, 3 Madd. 537. The principles applicable to timber cases apply generally to cases of mines and quarries (see Buckley *v.* Howell, 29 Beav. 555, 556, 557; *Re* Barrington, 33 Ch. D. 527). No doubt, if, at the time when the title of a tenant for life or years accrues, a mine or quarry has been partially worked, he may continue the working; whereas, if, at the same time, a wood has been partially felled, he cannot, unless dispunishable for waste, fell the other trees in the wood (see the argument in Dickin *v.* Hamer, 1 Dr. & Sm. 284, 291, 292). And, on the other hand, particular trees, or clumps of trees, in which a person under disability is interested, will sometimes, in a due course of management, be directed by the Court to be cut, when, under like circumstances, a mine would not be directed to be worked (see *Re* Smith, 10 Ch. 84, 85). However, in the former case, the right in respect of a mine or quarry should not, it is submitted, be compared with that in respect of a wood or forest, but rather with that in respect of a single tree. And in the latter, the direction is put upon some such special ground, as that the trees are too old, or that their cutting would be for the benefit of other trees.

[2] See the timber case of Turner *v.* Wright, 1 Joh. 740, 2 De G. F. & J. 234. Wright *v.* Atkyns, T. & R. 157, contains a query as to the position.

[3] As to open mines or quarries, see *ante*, pp. 55 *et seq.*

[4] Oxenden *v.* Compton, 2 Ves. jun. 73.

Infant tenant in tail.

An infant tenant in tail in possession may, by his guardian, work mines and quarries, open and new.[1]

b.—WORKINGS—TENANT FOR LIFE OR YEARS OR AT WILL.

(*a*) *Rights as respects Open Mines or Quarries.*[2]

Right of tenant for life to work open mines.

It is the general *primâ facie* right of a tenant for life, as between himself and the remainderman, to work open mines: and if he does so work, he has the right of property in the minerals, which by the working he converts into chattels.[3] And if he derives his interest under a will, his rights are irrespective of whether trustees of that will have or have not been appointed by the testator.[4] In strictness the position of the tenant for life in this respect may be thought to be an anomaly. Minerals are not like annual fruits. When once taken away they do not replace themselves.[5] "There is no fruit; that is to say, there is no increase; there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests."[6] This position of the usufructuary was, however, well recognised in the Roman jurisprudence, and in England as far back as the reign of Edward III., and in Scotland as far back as the year 1503; and the original ground of it is the presumed will and intention of the settlor.[7]

[1] See Lyddal *v.* Clavering, cited Amb. 371, n.; Clavering *v.* Clavering, Mosely, 223. As to open and new mines, see *ante*, pp. 55 *et seq.* See also the provisions of the Act, 44 & 45 Vict. c. 41, referred to, *post*, pp. 100, 101.

[2] As to open mines or quarries, see *ante*, pp. 55 *et seq.*

[3] Saunders' Case, 5 Co. 12 a., Co. Litt. 54 b.; Astry *v.* Ballard, 2 Mod. 193; Campbell *v.* Leach, Amb. 748; Clavering *v.* Clavering, Mosely, 223, 2 P. Wms. 388; Plymouth *v.* Archer, 1 B. C. C. 160; Stoughton *v.* Leigh, 1 Taunt. 402; Viner *v.* Vaughan, 2 Beav. 466; Ferrand *v.* Wilson, 15 L. J. 41, 53; S. C. 4 Ha. 388; Spencer *v.* Scurr, 31 Beav. 334; Bagot *v.* Bagot, 32 Beav. 516; Clegg *v.* Rowland, 2 Eq. 160; Miller *v.* Miller, 13 *ib.* 263; Elias *v.* Snowdon, &c., Co., 4 A. C. 454; Campbell *v.* Wardlaw, 8 A. C. 645, 647, 650; *Re* Ridge, 31 Ch. D. 508; Dashwood *v.* Magniac, 1891, 3 Ch. 327, 360, 361, 385; *In re* Kemeys-Tynte, 1892, 2 Ch. 211; Greville-Nugent *v.* Mackenzie, 1900, A. C. 83, 88. The law of Scotland is the same: Campbell *v.* Wardlaw, *sup.*

[4] See Thursby *v.* Thursby, 19 Eq. 413.

[5] Campbell *v.* Wardlaw, 8 A. C. 644; Dashwood *v.* Magniac, 1891, 3 Ch. 328, *per* Chitty, J.

[6] Gowan *v.* Christie, L. R. 2 Sc. & D. 273, *per* Lord Cairns; Campbell *v.* Wardlaw, *sup.* 649; Greville-Nugent *v.* Mackenzie, 1900, A. C. 87–8, *per* Lord Halsbury.

[7] Campbell *v.* Wardlaw, *sup.* 645, *per* Lord Blackburn, 650, *per* Lord Watson; Dashwood *v.* Magniac, 1891, 3 Ch. 328, *per* Chitty, J., 360, *per* Bowen, L.J.; *Re* Chaytor, 1900, 2 Ch.

A tenant for years stands upon the same footing in the above respect as a tenant for life.[1] And a lessee under any lease made on or after the 1st January, 1861, of land in Ireland containing open mines, has, *primâ facie*, a statutory right to work them and remove the minerals, whether they are granted by name or not in the lease.[2] Tenant for years.

The same principles apply in the case of open quarries.[3] It is no doubt true, that stone or slate is frequently dug from a quarry for the purpose of building or repairing houses on the property of the owner, and that a person subsequently becoming the tenant for life or years cannot, by the mere fact of such digging, claim the right to work the quarry. But in such a case the quarry has never in fact become an open quarry.[4] Similarly, where a bog, which had been previously cut for sale, is demised for life or years as bog, the tenant may, *primâ facie*, cut and sell turf thereout.[5] Open quarries.

If a reversioner or remainderman complains, that a tenant for life or years is improperly working a mine or quarry; and the latter alleges, that it was open when he entered into possession; and no lapse of time has occurred; the onus is in general on the latter to prove his allegation.[6] If, however, a tenant for life or years shows, that there had, in fact, been workings when he entered into possession, the onus is in general shifted, and it then lies on the reversioner or remainderman to show, that the workings were not such as to constitute the mine or quarry an open mine or quarry.[7] In like manner, where a Onus of proof when fact of being open disputed.

809, 810; Home *v.* Belhaven, 1903, A. C. 327; Chaytor *v.* Trotter, 87 L. T. 33. See *ante*, p. 57.

[1] See Offley *v.* Offley, Pr. Ch. 26; Coppinger *v.* Gubbins, 3 J. & L. 397; Campbell *v.* Wardlaw, *sup.* at p. 647; and generally the cases cited, *ante*, p. 84, n.[3]

[2] 23 & 24 Vict. c. 154, s. 27.

[3] Elias *v.* Griffith, 8 Ch. D. 521, 526, 532; nom. Elias *v.* Snowdon, &c., Co., 4 A. C. 454; overruling Mansfield *v.* Crawford, 9 Ir. Eq. Rep. 271: see also Moyle *v.* Mayle, Owen, 66, 67; Ferrand *v.* Wilson, 15 L. J. Ch. 54; Huntley *v.* Russell, 13 Q. B. 583; Tucker *v.* Linger, 21 Ch. D. 27; Campbell *v.* Wardlaw, 8 A. C. 645; Dashwood *v.* Magniac, 1891, 3 Ch. 385; Greville-Nugent *v.* Mackenzie, 1900, A. C. 83.

[4] See Elias *v.* Griffith, 8 Ch. D. 532 see *ante*, p. 58.

[5] Anon., 1 Hog. 147; Jack *v.* Creed 2 Hud. & Bro. 143; Coppinger *v* Gubbins, 3 J. & L. 410; Dashwood *v.* Magniac, 1891, 3 Ch. 361, 385. These cases must be taken to overrule Waterpark *v.* Austen, 1 Jones, 627, n.

[6] Elias *v.* Snowdon, &c., Co., 4 A. C. 461. Cf. Bartlett *v.* Phillips, 4 De G. & J. 421.

[7] Elias *v.* Snowdon, &c., Co., *sup.* 459, 461, 462; Atherley *v.* Sanders (Ap. 1881, *coram* Kay, J.). See, however, Bartlett *v.* Phillips, 4 De G. & J. 414.

tenant for life or years of a mine or quarry has once shown, that a lease of the mine or quarry had been granted, and that workings coeval therewith had taken place on the land subject to the lease; and his own subsequent workings have extended over a long period; and during that period the owner of the inheritance was capable of ascertaining all the facts, was competent to act, and remained passive; it lies on such owner to show, that the workings did not take place under the authority of the lease.[1]

Proceeds of sales.

On similar principles, a tenant for life or years was held entitled to receive the capital of the proceeds of a sale by the trustees of his settlement of gravel dug from lands, the profits of which had usually for many years been gained by working the gravel pits. The whole of the gravel was, in effect, a mine, and each gravel pit a fresh pit in the mine.[2] And, speaking generally, a tenant for life or years is entitled to the capital of the proceeds of workings under powers given by his settlor.[3]

Rents.

He is also entitled to the capital of rents or royalties payable under a lease of mines made by, or in pursuance of powers given by, his settlor;[4] or payable in respect of a new seam opened by the lessee in a mine demised by his settlor;[5] or payable under a lease granted by himself under the powers of the Settled Land Acts, for the purpose of carrying into effect an agreement for a lease made by his settlor.[6] So a tenant for life was held entitled to rent and royalty under a lease of mines or quarries open at the date of the settlement; although the settlement contained a trust for sale, and did not contain any express power to demise mines or quarries, but only a power to demise the unsold parts of the hereditaments in which they were included.[7] The law of Scotland is the same.[8]

[1] Elias *v.* Snowdon, &c., Co., *sup.* 461, 462.

[2] Cowley *v.* Wellesley, 1 Eq. 659; 35 Beav. 639.

[3] Chaytor *v.* Trotter, 87 L. T. 33. See *ante*, p. 57.

[4] See Daly *v.* Beckett, 24 Beav. 114; Cowley *v.* Wellesley, 35 Beav. 638, 639; Miller *v.* Miller, 13 Eq. 263; Brigstocke *v.* Brigstocke, 8 Ch. D. 363; *Re* Kemeys-Tynte, 1892, 2 Ch. 211; Wallis *v.* Barker, 88 L. T. 685.

[5] Spencer *v.* Scurr, 31 Beav. 334; *ante*, p. 59.

[6] Re Kemeys-Tynte, 1892, 2 Ch. 211. See further as to leases granted under the Settled Land Acts, *post*, pp. 186—194.

[7] Greville-Nugent *v.* MacKenzie, 1900, A. C. 83.

[8] Home *v.* Belhaven, 1903, A. C. 327, 340. The year's rent for the purpose

A dowress stands upon the same footing, for the purpose of working mines, as an ordinary tenant for life. If, therefore, lands be actually assigned to a lady for her dower,[1] and such lands contain open mines or quarries, she may, *primâ facie*, work them for her own benefit.[2] And even if no actual assignment of lands be made to her, she is entitled, *primâ facie*, to receive one-third of the sale proceeds;[3] or of the rents or royalties payable under a lease;[4] of the open mines or quarries which they contain.[5] Dowress.

The *primâ facie* right of a grantee for life or years, as against the grantor, is not rebutted by an exception in a lease of land containing open quarries of "all royalties."[6] The *primâ facie* right of a tenant for life, as against the remainderman, to work open mines and quarries may of course be negatived by express directions by the settlor to the contrary.[7] And a lessee under any lease made on or after the 1st of January, 1861, of land in Ireland, containing open quarries or open beds of sand, marl, gravel, or clay, although entitled to work them for the purposes of agriculture, and the erection or repair of necessary buildings, is, *primâ facie*, under a statutory disability to do so for trade or manufacture, or for profit or sale.[8] Presumption rebuttable.

A mere tenant at will has no right of property in minerals, which by working are converted into chattels.[9] Tenant at will.

The general right of a tenant for life or years of open mines or quarries does not, *primâ facie*, exist, where they are comprised in a residuary gift of personalty. Where a will contains a bequest not specific of a subject in its nature perishable or speculative, that subject should, even in the absence of a trust Position under residuary bequest.

of measuring the right of a superior under Scotch law to a composition on the entry of a singular successor includes mineral royalties, however nearly exhausted the minerals may be: see *ib.*

[1] See *post*, p. 283.

[2] Stoughton *v.* Leigh, 1 Taunt. 402; Dickin *v.* Hamer, 1 Dr. & Sm. 295.

[3] See and consider Dickin *v.* Hamer, *sup.*

[4] See Stoughton *v.* Leigh, *sup.*; *Re* Kemeys-Tynte, 1892, 2 Ch. 218.

[5] As to infants, see the provisions of the Act, 44 & 45 Vict. c. 41, referred to *post*, pp. 100, 101.

[6] Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108; Listowel *v.* Gibbings, 9 *ib.* 223; overruling Purcell *v.* Nash, 1 Jones, 625, 2 Jones, 116.

[7] Ferrand *v.* Wilson, 15 L. J. Ch. 41, 54; S. C. 4 Ha. 344, 388: see also Campbell *v.* Wardlaw, 8 A. C. 646, 650.

[8] 23 & 24 Vict. c. 154, s. 28.

[9] A.-G. *v.* Tomline, 5 Ch. D. 758; Morgan *v.* William Harrison, Limited, 1907, 2 Ch. at 143.

for conversion, be converted and invested.[1] Effect will, however, be given to indications of a contrary intention. Thus a power to trustees, "in case they shall deem it beneficial so to do, to conduct, carry on, and continue the collieries which I am possessed of," will relieve them from the obligation to convert.[2] And where a testator gave a general discretion to trustees to retain investments, it was held, that, during the retainer of shares in a colliery company, the tenant for life was entitled to the income.[3]

Position under residuary devise in trust for sale.

Where a testator devised his residuary real estate to trustees upon trust to sell "when in their discretion it may seen advisable;" and directed, that the "profits" should until sale be considered as personal estate, and be applicable as income of the sale proceeds; and gave the income to a tenant for life; and part of the residue was a brickfield demised upon royalties; and the trustees abstained from selling, and allowed the brickfield to be worked out; it was held that the tenant for life was entitled to the royalties.[4] And where a will contained a trust for sale after the death of the last tenant for life, and an implied power to the trustees to let in the meantime, and the trusts of the will and the position at the testator's death were otherwise similar; and, upon the expiration of the lease there in question, the trustees let the brickfield from year to year, there was a similar decision.[5] Indeed it has been held, that, where a fee simple estate in mines subject to a lease formed part of a residue; and the residue was devised upon a mere trust to sell, and invest the proceeds, and pay the income to a lady for her life; she was, until the sale, entitled to the rents.[6]

Compensation when royalties not applicable as income.

Where lands comprised in a residue are vested in trustees upon trust to sell, with a power to postpone; and shares of the proceeds are settled; and part of the lands consists of mines in lease; and the royalties are not applicable as income; the

[1] See Wightwick *v.* Lord, 6 H. L. Cas. 228; Thursby *v.* Thursby, 19 Eq. 406.

[2] Thursby *v.* Thursby, *sup.*: see also Wightwick *v.* Lord, 6 H. L. Cas. 217; affirming Lord *v.* Wightwick, 4 De G. M. & G. 803, which varied S. C. 1 Dr. 576.

[3] Hodgson *v.* Bates, 1907, 1 Ch. 22.

[4] Miller *v.* Miller, 13 Eq. 263: see also Garton *v.* Cumberland, 1909, 1 Ch. at p. 630: and see Thursby *v.* Thursby, 19 Eq. 395, 414.

[5] Garton *v.* Cumberland, 1909, 1 Ch. 625.

[6] Clifton *v.* Darnley, 1907, 1 Ch. 159.

tenants for life are entitled during the period of postponement to receive out of the royalties interest at 3 per cent. per annum on the capital value.[1] And where, in circumstances otherwise similar, the period of postponement expires; and the trustees nevertheless retain the lands unsold; the tenants for life are, as from the expiration of the period, entitled to receive out of the royalties a fair equivalent for the income which would have resulted, if the lands had been sold.[2] And in either case the tenants for life are entitled to the income of the investments of the surplus royalties.[3]

Surface rent.

When surface land is leased as incidental to a lease of mines, the right to receive the surface rent may depend on the right to receive the mineral rents.[4] Indeed, in a case of dower, it has been decided, that if a lease of unopened mines or quarries be granted before an assignment is actually made to the dowress; and if, as incident to the lease, liberty be given to the lessee to use any portion of the surface; the dowress is entitled, *primâ facie*, to receive one-third of the rent payable in respect of such liberty.[5]

(β) *Rights as respects New Mines or Quarries*[6]*—Legal Waste.*

Limited rights as respects new mines or quarries.

A tenant for life or years may, *primâ facie*, as between himself and the reversioner or remainderman, dig in a new mine or quarry, in a reasonable degree, for gravel, clay, coal, and limestone, for the reparation of the house, the improvement of the land, and other estovers.[7] So, he may dig for turf in a bog for purposes of consumption.[8] And a lessee under any lease made on or after the 1st January, 1861, of land in Ireland containing turf bog unreclaimed and unprofitable for agriculture; or who has been given a right of turbary on

[1] Gabellini *v.* Woods, 1904, 2 Ch. 4; *Re* Chaytor, 1905, 1 Ch. 233.

[2] Wentworth *v.* Wentworth, 1900, A. C. 163, 172.

[3] *Ib.*; Gabellini *v.* Woods, 1904, 2 Ch. 4.

[4] See Wentworth *v.* Wentworth, *sup.* at p. 164.

[5] Dickin *v.* Hamer, 1 Dr. & Sm. 284, 299.

[6] As to new mines or quarries, see *ante*, pp. 55 *et seq.*

[7] Co. Litt. 53 b.; 2 Roll. Abr. 816: see also Moyle *v.* Mayle, Owen, 66, 67; Campbell *v.* Wardlaw, 8 A. C. 645. See, however, Ferrand *v.* Wilson, 15 L. J. Ch. 54.

[8] Wilson *v.* Bragg, 8 Bac. Abr. 428; De Salis *v.* Crossan, 1 B. & B. 188; nom. De Salis *v.* ——, 2 Mol. 516; Courtown *v.* Ward, 1 Sch. & L. 8; Howley *v.* Jebb, 8 Ir. C. L. R. 435; Coppinger *v.* Gubbins, 3 J. & L. 410.

the premises, or a right of common of turbary on other premises; has, *primâ facie*, a statutory right to cut and use turf bog for the use on the demised premises of the lessee and his sub-tenants.[1]

General disability in other respects —legal waste.

However, except under the above-stated circumstances, a tenant for life or years is not, in general, entitled, *primâ facie*, as between himself and the reversioner or remainderman, to open or work a new mine or quarry;[2] or to cut turf in a bog.[3] For all such acts on his part would, although he has the right of possession,[4] and may maintain trespass for wrongful workings by other persons,[5] constitute legal waste.[6] And a lessee for a long term cannot, of course, claim the right to open and work on the mere ground that it would be against public policy to prevent the working until the term ends.[7] And, a lessee not being able to give his assignee any better title than he has himself, if a lessee opens a new mine, and then assigns over his estate, the assignee cannot, of course, dig in such mine.[8] And a lessee of lands in Ireland for an estate less than a perpetual estate under any lease made after the 1st January, 1861, is, *primâ facie*, under a statutory

[1] 23 & 24 Vict. c. 154, s. 29.

[2] Saunders' Case, 5 Co. 12 a.; Co. Litt. 53 b., 54 b.; D'Arcy *v.* Askwith, Hob. 234; Astry *v.* Ballard, 2 Mod. 193; Campbell *v.* Leach, Amb. 748; Whitfield *v.* Bewit, 2 P. Wms. 242; Plymouth *v.* Archer, 1 B. C. C. 160; Wentworth *v.* Turner, 3 Ves. 3; Anon., cited in Mitchell *v.* Dors, 6 *ib.* 147; S. C. nom. Flamang's Case, 7 *ib.* 308; De Salis *v.* Crossan, *sup.*; Menzies *v.* Breadalbane, 1 Shaw. App. at p. 228; Viner *v.* Vaughan, 2 Beav. 466; Ferrand *v.* Wilson, 15 L. J. Ch. 41, 53; S. C. 4 Ha. 344; Daly *v.* Beckett, 24 Beav. 120; Spencer *v.* Scurr, 31 *ib.* 334; Bagot *v.* Bagot, 32 *ib.* 516; Stepney *v.* Chambers, W. N. 1866, p. 401; Clegg *v.* Rowland, 2 Eq. 165; Elias *v.* Snowdon, &c., Co., 4 A. C. 454; Dashwood *v.* Magniac, 1891, 3 Ch. 361; Shaftesbury *v.* Wallace, 1897, 1 Ir. R. 381. An inquiry will, if necessary, be directed, whether any and what mines and quarries have been opened and worked by any and what persons, which were not opened at the commencement of the interest of the tenant for life for years. For the form, see Ferrand *v.* Wilson, 4 Ha. 388, 389; Gresley *v.* Mousley, 4 De G. & J. 101, 102; S. C. 3 De G. F. & J. 433; Bagot *v.* Bagot, Seton, 545, 546.

[3] See Wilson *v.* Bragg, 8 Bac. Abr. 428; Courtown *v.* Ward, 1 Sch. & L. 8; Coppinger *v.* Gubbins, 3 J. & L. 410: see also Burrows *v.* Hayes, Hay. & Jo. 597; Chatterton *v.* White, 1 Ir. Eq. Rep. 200; Massey *v.* Gubbins, Longf. & Towns, 88; Dashwood *v.* Magniac, 1891, 3 Ch. 385.

[4] See *ante*, p. 66.

[5] See *post*, p. 536.

[6] Co. Litt. 53 b., 54 b.; Menzies *v.* Breadalbane, *sup.*; Keyse *v.* Powell, 2 E. & B. 144; Clegg *v.* Rowland, 2 Eq. 165; *Re* Ridge, 31 Ch. D. 507, 508.

[7] See Doherty *v.* Allman, 3 A. C. 734; Elias *v.* Griffith, 8 Ch. D. 525.

[8] Saunders' Case, 5 Co. 12 a.

disability to work new mines or quarries therein, or (except as regards turf bog [1]), to remove the soil or surface or subsoil thereof.[2] And a lessee under any lease made on or after the 1st January, 1861, of land in Ireland containing turf bog unreclaimed and unprofitable for agriculture; or who has been given a right of turbary on the premises, or a right of common of turbary on other premises; is, *primâ facie*, under a statutory disability to cut and use the turf bog for trade or manufacture, or for profit or sale.[3]

Tenant by curtesy—dowress—jointress.

The estate of a tenant by the curtesy,[4] or a dowress,[5] or a jointress,[6] is an estate for life impeachable of waste. If, therefore, lands actually assigned to a lady for her dower [7] contain new mines or quarries, she cannot, *primâ facie*, work them.[8]

Tenant for renewable lives or years

Independently of statute, a tenant for lives renewable for ever stands with respect to waste on the same footing as an ordinary tenant for life.[9] And the law is the same with respect to a tenant for years renewable for ever.[10] However, every tenant of lands in Ireland entitled to a perpetual interest under any lease made after the 1st January, 1861, has, *primâ facie*, a statutory right to commit waste other than fraudulent or malicious waste.[11]

Contrary intention.

However, where a man demises a bog, and no other property is included in the demise, and the bog is not convertible to any other use except that of cutting for sale, the lessee may, *primâ facie*, cut it for sale.[12] And where a man has new mines within his land, and demises for life or years such land, "with all mines therein," the lessee may, *primâ facie*, as between

[1] As to which, see *ante*, pp. 89, 90.

[2] 23 & 24 Vict. c. 154, s. 26.

[3] S. 29.

[4] 1 Cruise, 158.

[5] See Stoughton *v.* Leigh, 1 Taunt. 402, 410.

[6] See Clavering *v.* C., Mosely, 223; Tracy *v.* Tracy, 1 Vern. 23.

[7] See *post*, p. 283.

[8] Wilson *v.* Bragg, 8 Bac. Abr. 428; Dickin *v.* Hamer, 1 Dr. & Sm. 284, 295.

[9] It was formerly considered that a lessee for lives renewable for ever might cut turf for sale, or otherwise commit waste (Conolly *v.* Ely, 2 Moll. 515; Percy *v.* Shanly, *ib.*; Calvert *v.* Gason, 2 Sch. & L. 561; Harris *v.* Coppinger, 1 Hog. 478), unless there were special circumstances in his case, as where he owed a large arrear of rent (Pim *v.* Davies, 1 Hog. 11; White *v.* Nowlan, *ib.* 21). But this is not now law: see White *v.* Walsh, 1 Jones, 626, n.; Coppinger *v.* Gubbins, 3 J. & L. 410.

[10] Harris *v.* Coppinger, 1 Hog. 478.

[11] 23 & 24 Vict. c. 154, s. 25.

[12] Anon., 1 Hog. 147; Jack *v.* Creed, 2 Hud. & Bro. 143; Coppinger *v.* Gubbins, 3 J. & L. 410; Dashwood *v* Magniac, 1891, 3 Ch. 361, 385.

himself and his grantor, dig the new mines, and will not, by so doing, commit waste : [1] for otherwise the words "with all mines therein" would have no effect.[2] In fact, in each of these cases a mining lease, or its equivalent, has been granted. But where a man has within his land some mines open and some new, and leases his land for life or years, "with the mines therein," the open mines only will be comprised in the lease, and the lessee cannot, *primâ facie*, even as between himself and his grantor, dig the new mines.[3] And different principles apply to the conflicting claims of a limited owner and a reversioner ; and those of a limited owner and a remainderman, who is not the author of the settlement. If, for instance, a man seised in fee, grants the "lands and all mines therein," to trustees in fee to the use of one person for life with remainders over, the tenant for life cannot, *primâ facie*, as between himself and the remainderman, open new mines ; and the fact that the whole of the mines in question are new mines is immaterial.[4] Where a testator directed his trustees to pay to his wife for her life "the whole annual produce and rents" of his estate ; and after the testator's death the trustees leased new mines ; it was held that the direction was not sufficient to give to the wife the rents of such new mines.[5]

Meliorating waste.

And a limited owner may be free from liability for working, if his working has amounted to meliorating waste.[6] A limited owner has, for instance, been held free from liability for removing turf from a bog and converting it to his own use, where the removal had enabled a deeper layer of earth to be planted or ploughed.[7] So, he may, it has been said, be free from liability for removing stones from land and selling them, if the stones had previously covered the land to such an extent as to render it unfit for cultivation.[8] A right of removal

[1] Saunders' Case, 5 Co. 12 a. ; Co. Litt. 54 b. ; D'Arcy *v.* Askwith, Hob. 234 ; Clegg *v.* Rowland, 2 Eq. 160 ; Dashwood *v.* Magniac, 1891, 3 Ch. 360.

[2] Co. Litt. 54 b.

[3] *Ib.* ; Astry *v.* Ballard, 2 Mod. 193 ; Clegg *v.* Rowland, *sup.* Cf. *Re* Baskerville, 1910, 2 Ch. 329.

[4] See Whitfield *v.* Bewit, 2 P. Wms. 242 ; Daly *v.* Beckett, 24 Beav. 120.

[5] Campbell *v.* Wardlaw, 8 A. C. 641.

[6] See generally as to meliorating waste, Doherty *v.* Allman, 3 A. C. 709.

[7] Coppinger *v.* Gubbins, 3 J. & L. 417, 418 ; Harris *v.* Ekins, 20 W. R. 999. See, however, the question asked by Jessel, M.R., in Tucker *v.* Linger, 21 Ch. D. 32.

[8] Harris *v.* Ekins, *sup.*, *per* Bacon, V.-C. ; see also Jesus Coll. *v.* Bloom,

does not, however, necessarily imply a right of appropriation or sale. There may, as Lord Coke says,[1] be waste "by the vendition." And it seems open to question, whether, independently of custom, a right of appropriation or sale can be properly founded on the doctrine of meliorating waste.[2] At all events, independently of custom, a person will not, it seems, on the mere assertion, that he will improve land after he has committed a waste, be allowed to commit the waste in the first instance.[3]

Usage.

And local custom or usage may entitle a limited owner both to work, and to appropriate or sell; and none the less because it may have grown up in recent years.[4] And such custom or usage may be imported into a lease or tenancy agreement, if not inconsistent with its provisions. Where, for example, an agricultural tenant agreed to cultivate the land according to the most approved system, and to commit no waste, and to use it for agricultural purposes only; and the agreement excepted "all mines and minerals, sand, quarries of stone, brick earth, and gravel pits;" and the land was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and their removal was necessary in order to cultivate the land effectually; and there was evidence, that it was the custom of the country for tenants to remove such [5] flints and sell them, when not prohibited by their leases; and the tenant did not plough for the purpose of getting the flints, but complied strictly with the custom; it was held, that the custom was reasonable and good, and that the landlord had no remedy.[6]

Intermediate termor.

It has been held, that an intermediate assignee of a term,

Amb. 55, 56. A limited owner cannot, it is submitted, work, or be authorised by the Court to work, on the mere ground that the working should not be deferred. The power to cut particular clumps of timber in a due course of management furnishes no analogy upon this point: see and consider *Re* Smith, 10 Ch. 85; *ante*, p. 83, n. [1]. Lord Romilly, however, in Bagot *v.* Bagot (32 Beav. 522; Set. 545, 546), appears to have been of a different opinion.

[1] Co. Litt. 53 b.

[2] See Tucker *v.* Linger, 21 Ch. D. 27, 28, *per* Kay, J.

[3] Coppinger *v.* Gubbins, 3 J. & L. 418, *per* Lord St. Leonards.

[4] Tucker *v.* Linger, 21 Ch. D. 18; 8 A. C. 508: see Dashwood *v.* Magniac, 1891, 3 Ch. 324, 325, *per* Chitty, J., 354, 355, *per* Lindley, L.J.

[5] Observe the limited nature of the custom.

[6] Tucker *v.* Linger, *sup.*: see *ante*, p. 27.

who has never himself worked, but has received royalties under sub-leases granted before he came into possession, and has parted with his interest before the commencement of proceedings by the reversioner, is not liable to account either for the profits made, or for the royalties paid to him, during his possession of the term.[1]

Assent of remainderman.

The mere fact that a remainderman assents to the working of a new mine does not estop him from saying that the proceeds ought to be dealt with as *corpus*.[2]

"Without impeachment of waste"—ordinary tenant for life.

An estate may be given to a person for life or years "without impeachment of waste." And a tenant for life or years without impeachment of waste may, *primâ facie*, open and work new mines or quarries.[3]

Lunatic tenant for life.

Mines or quarries belonging to a lunatic tenant for life without impeachment of waste may be worked under the order of the Court, if such a course is for the benefit of the lunatic. In *Ex parte Tabbert*,[4] an agreement by the committee, that coal under such a lunatic's estate should be worked by the owner of the adjoining land, was established on the ground that the working would be for the benefit of the lunatic; and Lord Eldon, in sanctioning it, compared the case to that of cutting timber.[5]

(γ) *Lien for Expenditure.*

Lien for expenditure.

A tenant for life, who for many years made large annual payments in respect of foreign mines to keep them continually worked, and so prevent their being forfeited, was, although they were unproductive, held entitled, as against the remainderman, to a charge on the estate, for his outlay. But he was, in the same case, held disentitled to any charge in respect of moneys, which he voluntarily expended on copper works in England.[6]

(δ) *Improper Workings—Legal Waste—Remedies.*[7]

Trover—account.

If the injured party has the right of property in the minerals improperly worked; if, for instance, he is the reversioner or

[1] See Elias *v.* Griffith, 8 Ch. D. 521, 534.

[2] Campbell *v.* Wardlaw, 8 A. C. 648, 649, 652.

[3] See Dicconson *v.* Talbot, 6 Ch. 38; Campbell *v.* Wardlaw, 8 A. C. 656; *Re* Ridge, 31 Ch. D. 508.

[4] 6 Ves. 428.

[5] See also *Re* Smith, 10 Ch. 84, 85.

[6] Dent *v.* Dent, 30 Beav. 363.

[7] Formerly if a limited owner, impeachable of waste, committed waste,

remainderman in fee or in tail ; [1] he may maintain an action of trover ; [2] or he may have an account.[3] And his right to an account was never, as in legal waste in timber cases, confined to cases where he was entitled to an injunction ; [4] mining operations having always been looked on as a species of trade.[5]

Mining operations a species of trade.

If waste is committed by a tenant for life, acting in collusion with the first remainderman in fee or tail *in esse ;* or by a person who combines in himself the two characters ; to the prejudice of an intervening tenant in fee or tail not then *in esse*, whose rights are protected by the interposition of an estate given to trustees to preserve contingent remainders ; the trustees may have an action for an account.[6] Indeed, as contingent remainders are no longer destructible,[7] the only purpose, which can at the present day be served by introducing, in a settlement, a limitation to trustees to preserve them, is that the contingent remaindermen may be protected against waste ; and the land, the timber, and the mines, which together constitute the inheritance, preserved for them entire.[8]

Trustees to preserve contingent remainders.

Where an account has been directed against a wrongdoer or against his estate, interest at the rate of £4 per cent. per

Measure of damages.

the remedy of forfeiture of the place wasted was open to the person entitled to an estate of inheritance in remainder or reversion, if he issued a writ of waste ; and he was also entitled to treble the value of the thing wasted (6 Ed. 1, c. 5 ; Wentworth *v.* Turner, 3 Ves. 3). But these remedies were abolished by 3 & 4 W. 4, c. 27, s. 36. Cf. as to copyholds, and church lands, *post*, pp. 107, 113.

[1] See *ante*, p. 66.

[2] Clavering *v.* C., Mosely, 224 ; *Re* Barrington, 33 Ch. D. 527.

[3] See Jesus Coll. *v.* Bloom, Amb. 55, 3 Atk. 262 ; Garth *v.* Cotton, 2 L. C. 970 ; Jefferys *v.* Smith, 1 J. & W. 302 ; Parrott *v.* Palmer, 3 M. & K. 632 ; Ferrand *v.* Wilson, 4 Ha. 388 ; Coppinger *v.* Gubbins, 3 J. & L. 397 ; Elias *v.* Griffith, 8 Ch. D. 525, 526.

[4] See Jesus Coll. *v.* Bloom, Amb. 35 ; Parrott *v.* Palmer, 3 M. & K. 632.

[5] See Story *v.* Windsor, 2 Atk. 630 ; Lawton *v.* L. 3 Atk. 13, 16 ; Jesus Coll. *v.* Bloom, *sup.* ; Dudley *v.* Warde, Amb. 112, 114 ; Pulteney *v.* Warren, 6 Ves. 89 ; Flamang's Case, 7 Ves. 308 ; Wren *v.* Kirton, 8 Ves. 502 ; Crawshay *v.* Maule, 1 Swanst. 495, 528 ; Jefferys *v.* Smith, 1 J. & W. 298, 302 ; Rowe *v.* Wood, 2 *ib.* 555 ; Rose *v.* Nixon, *ib.* ; Williams *v.* Attenborough, T. & R. 73, 74 ; Fereday *v.* Wightwick, 1 R. & My. 49, Taml. 260 ; Parrott *v.* Palmer, *sup.* ; Tredwen *v.* Bourne, 6 M. & W. 463 ; Hart *v.* Clarke, 6 De G. M. & G. 250 ; Clegg *v.* Edmondson, 8 *ib.* 814 ; Glasbrook *v.* Richardson, 23 W. R. 50 ; Rule *v.* Jewell, 18 Ch. D. 662 ; Phillips *v.* Homfray, 24 Ch. D. 448 ; County of Gloucester Bank *v.* Rudry, &c., Co., 1895, 1 Ch. 637.

[6] Garth *v.* Cotton, 2 L. C. 970.

[7] See 40 & 41 Vict. c. 33.

[8] See Garth *v.* Cotton, *sup.* The trustees are themselves liable, if they consent to the waste, *ib.*

annum will be charged ;[1] and there will be no allowance for repairs or improvements.[2] But, although interest is in strictness due from the actual time of the wrongful working, it has been said, that the courts will endeavour to deal liberally with the estate of a deceased limited owner, and will be disinclined to allow an account of interest to be taken from a period anterior to his death.[3] Indeed it has been said, that this disinclination will exist, although it may have been impossible for the remainderman to commence his action in the lifetime of the limited owner.[4] The reason is stated to be that, in most cases, the parties being family relations, it would not be for their benefit to go into a long and expensive inquiry as to the nature of the waste committed, and the circumstances under which it was committed.[5] In other respects the account will be taken on the principles which would have determined the measure of damages, if the wrongdoer had been a stranger.[6]

Mode of dealing with proceeds—no person *in esse* entitled to inheritance.

If, at the time of the improper working, there is not any person *in esse* entitled to an estate of inheritance in reversion or remainder, the severed chattels must be realised, invested, and dealt with ; or the amount to be accounted for must be invested, and dealt with ; as part of the *corpus* of the estate.[7] The wrongdoer will not, however, be allowed to receive the income ; which will be accumulated, and invested during his life, and added to the original investments.[8] And, if at the death of the wrongdoer, there is a person entitled in possession to an estate of inheritance, such person will be entitled absolutely to the principal of the total investments. But if, instead of being succeeded by a person entitled in possession to an estate of inheritance, the wrongdoer is succeeded by tenant for life, the income of the total investments will be paid to such tenant during his life, and, if necessary, to his successor

[1] See Bagot *v.* Bagot, 32 Beav. 509, 519, 520 ; Phillips *v.* Homfray, 1892, 1 Ch. 465.

[2] Bagot *v.* Bagot, *sup.* 523.

[3] See Bagot *v.* Bagot, *sup.* 519, 520. This case was appealed, but compromised, with the approval of Lord Westbury, who expressed his concurrence in Lord Romilly's view as to the time from which the account of interest should be taken : see 33 L. J. Ch. 122, n.

[4] Bagot *v.* Bagot, *sup.*

[5] *Ib.*

[6] See Tucker *v.* Linger, 21 Ch. D. 29, *per* Kay, J. As to a stranger, see *post*, pp. 538 *et seq.*

[7] See Bagot *v.* Bagot, 32 Beav. 509, 522.

[8] *Ib.*

in like manner, until some person becomes entitled in possession to an estate of inheritance; who will thereupon also become absolutely entitled to the principal.[1] And, in order to entitle the tenant for life, who succeeds to the wrongdoer, to the income, it is not necessary that he should be unimpeachable of waste.[2]

Person *in esse* entitled to inheritance.

If, however, at the time of the improper working, there is any person *in esse* entitled, either indefeasibly [3] or defeasibly,[4] to an estate of inheritance, the property in the severed chattels; or the amount to be accounted for; will belong absolutely and immediately to such person, or (if there are more than one), to the first of such persons. And the right of the person so entitled is not affected by the circumstance that between his estate and that of the wrongdoer is interposed in the order of the limitations an estate for life *in esse* without impeachment of waste.[5]

Illustrations.

Accordingly, if an estate is settled upon A. for life; remainder to B., either with or without impeachment of waste, for life; remainder to the unborn son of B., in fee or in tail; and A. engages in a series of improper workings; and during these workings the son of B. comes into *esse;* and A. is called on to account; the money to be accounted for will be dealt with as follows. So far as it can be attributed to the workings which took place prior to the birth of B.'s son, it will be invested and accumulated until A.'s death: the income of such accumulations will then be paid to B. during his life; and, upon B.'s death, the principal will belong to his son absolutely. But so far as it can be attributed to workings subsequent to the birth of B.'s son, it will belong immediately and absolutely to the son.[6]

[1] *Ib.*

[2] *Ib.*

[3] *Ib.*; Bell *v.* Wilson, 1 Ch. 309; *Re* Barrington, 33 Ch. D. 527.

[4] In Bagot *v.* Bagot, *sup.*, Lord Romilly laid it down, that the amount to be accounted for would not belong to the person entitled to the estate of inheritance, unless such person were entitled indefeasibly, and could not so belong if there was a possibility of a prior tenant in fee or tail coming into *esse*. This, however, is only a dictum, and is opposed to the earlier authorities, and Sir G. Jessel refused to follow it in Cavendish *v.* Mundy, W. N. 1877, p. 198.

[5] *Re* Barrington, *sup.*

[6] See Bagot *v.* Bagot, 32 Beav. 509. This case was appealed, but compromised with the approval of Lord Westbury upon terms which support the propositions in the text. See 33 L. J. Ch. 122, n. For the form of the inquiries and accounts directed in Bagot *v.* Bagot, see Set. 545, 546.

Owner of inheritance adopting working.

However, if the owner of an estate of inheritance by his acts adopt and confirm the improper workings, he cannot claim to be entitled *in præsenti* to the moneys arising from them; but will only be entitled to them after the death of the tenant for life; and the tenant for life will, during his life, be entitled to the income.[1]

Injunction.

In addition to his other remedies, the remainderman or reversioner may have an injunction.[2] And trustees to preserve contingent remainders may have an injunction to restrain waste committed by a tenant for life who acts collusively with the remote remainderman.[3] And it is not necessary for a plaintiff to wait until waste is actually committed. He may obtain an injunction upon a threat to commit it.[4]

Reluctance to grant interlocutory injunction.

Before, however, an interlocutory injunction will be granted to restrain the working of mines, the working of which has been actually commenced, a clear title to relief must be established. The Court is otherwise reluctant to interfere, on account of the serious injury which may be caused.[5]

(ε) *Improper Workings—Legal Waste—Loss of Remedies.*

Stat. of Limitations.

The Statute of Limitations, in cases of legal waste, as against a remainderman or reversioner, entitled to an estate of inheritance, and not under disability, operates as a bar after six years.[6]

Acquiescence.

It may be, that, where a landlord lies by, and permits a tenant impeachable of waste to expend large sums on a bog with a view to cutting it, his right to an injunction is barred.[7]

Death of wrongdoer.

The right to an account is not put an end to by the death

[1] See Gresley *v.* Mousley, 3 De G. F. & J. 433.

[2] Flamang's Case, 7 Ves. 308; Viner *v.* Vaughan, 2 Beav. 466; Ferrand *v.* Wilson, 4 Ha. 388; Coppinger *v.* Gubbins, 3 J. & L. 397 (observed upon in Doherty *v.* Allman, 3 A. C. 734); Campbell *v.* Wardlaw, 8 A. C. 652. For the form of the injunction, see Viner *v.* Vaughan, *sup.*

[3] Garth *v.* Cotton, 2 L. C. 970.

[4] See Gibson *v.* Smith, 2 Atk. 182.

[5] See Clavering *v.* Clavering, 2 P. Wms. 388, Mosely, 223; see also Filewood *v.* Palmer, Mosely, 171; Anon., Amb. 209; and cf. Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 283; Birmingham Canal Co. *v.* Lloyd, 18 Ves. 516; Field *v.* Beaumont, 1 Swanst. 208; Hilton *v.* Granville, 1 Cr. & Ph. 297; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552. As to prevention of waste under 23 & 24 Vict. c. 154 (Ireland), see ss. 35 *et seq.*

[6] Elias *v.* Griffith, 8 Ch. D. 528.

[7] Burroughs *v.* Hayes, Hay. & Jo. 597.

of the wrongdoer. The injured party may have an account against his estate.[1]

Bar only in respect of severed chattels.

And where the remedy is barred, it is only barred as respects the chattels actually severed and abstracted. For example, improper workings, for however long a period, by a tenant for life or years, will not create a right to continue them; or disentitle the reversioner or remainderman, when he pleases, to interpose and prevent the continuance.[2]

(ζ) *Equitable Waste.*

Primâ facie disability.

A tenant for life or years, without impeachment of waste, cannot, *primâ facie*, commit equitable waste. He is bound to work with due care and attention to the interests of those who come after.[3] In a case, therefore, where a lessee for years was unimpeachable of waste, it was held, that he was not justified in digging all the soil of a field for bricks, as this would be, in effect, destroying the field.[4]

Remedies.

A person, who commits equitable waste, is liable to the same remedies in trover or account, and injunction, as a person who commits legal waste.[5]

c.—WORKINGS—REVERSIONER OR REMAINDERMAN.

Disability.

Under no circumstances, not even where the tenant for life or years has no right to work,[6] is the reversioner or remainderman entitled to do so.[7] His interest in the mines and quarries is the same as his interest in the other parts of the inheritance—a reversion or remainder, strictly so called; and he cannot exercise his rights by anticipation.

Mode of dealing with proceeds.

And if during the possession of a tenant for life or years impeachable of waste, minerals are severed from the inheritance by the act of the reversioner or remainderman, the

[1] Bagot *v.* Bagot, 32 Beav. 509. For the form of the account, see Bagot *v.* Bagot, Set. 545, 546. For the application of the maxim, *actio personalis moritur cum personâ*, see further, *post*, p. 550.

[2] Courtown *v.* Ward, 1 Sch. & L. 8; Elias *v.* Griffith, 8 Ch. D. 521, 524, 525.

[3] See Rowe *v.* Wood, 2 J. & W. 556, *per* Lord Eldon.

[4] London *v.* Web, 1 P. Wms. 527.

[5] *Ante*, pp. 94, 95, 98; London *v.* Web, 1 P. Wms. 527.

[6] See *ante*, pp. 87, 88, 90, 91.

[7] See Menzies *v.* Breadalbane, 1 Sh. App. at p. 228; Dickin *v.* Hamer, 1 Dr. & Sm. 295; Doherty *v.* Allman, 3 A. C. 734.

tenant for life or years is entitled to have the proceeds invested, and the income paid to him during his tenancy.[1] So, if no actual assignment has been made to a lady for her dower,[2] and the remainderman works new mines or quarries in lands in respect of which she is dowable without her consent, although she is not entitled to any interest in the *corpus*, she is entitled, *primâ facie*, to receive one-third of the income derivable from the produce.[3]

Acquiescence.

A tenant for life or years may, however, by acquiescing in the exercise of his rights by anticipation by a reversioner or remainderman, disentitle himself to the remedy which he would otherwise have.[4]

d.—WORKINGS—TRUSTEES.

Conv. Act, 1881.

Trustees have no right, *primâ facie*, of their own motion, to work mines or quarries. However, the Conv. Act, 1881,[5] contains provisions empowering trustees, in certain cases, to do so. If and so long as any person, who, but for those provisions, would be beneficially entitled to the possession of land, is an infant, and being a woman is also unmarried, the trustees appointed for that purpose by the settlement (if any); or, if there are none so appointed, the persons (if any) who are for the time being trustees, with power of sale of the settled land or of part thereof, or with power of consent to or approval of the exercise of such a power of sale; or if there are none, any persons appointed as trustees for that purpose by the Court, on the application of a guardian or next friend of the infant; may enter into and continue in possession of the land. And such trustees may continue the working of mines, minerals, and quarries, which have usually been worked. But, unless the infant is entitled without impeachment of waste, they cannot work new mines or quarries. For, where the infant is impeachable for waste, they are not entitled to commit waste. They may apply any net income from the workings for the maintenance, education, or benefit of the infant, or they may pay it to the parent or guardian to be applied for the same purposes;

[1] See and consider Dickin *v.* Hamer, 1 Dr. & Sm. 284.

[2] See *post*, p. 283.

[3] See Dickin *v.* Hamer, *sup.* 298, *per* Kindersley, V.-C.

[4] See Dickin *v.* Hamer, *sup.*

[5] 44 & 45 Vict. c. 41.

and the residue of the income must be applied according to the provisions of the Act.[1]

In all proper cases an instrument under which mines or quarries are settled; whether it be a strict settlement, or a settlement containing a trust for sale and a power to postpone it, or a settlement containing a mere power of sale; should contain express powers as to their working and management. And the trustees (if any) of the settlement should in general be made the donees of the powers. By this means the preference of one of the beneficiaries to another will be best avoided; the trustees being bound to act fairly to both.[2] During minorities the trustees are necessarily made the donees. Express powers.

e.—USER.

(*a*) *Ordinary Tenancies in Fee.*

Where the owner in fee simple of lands grants them, excepting the underlying mines, he has an absolute right to use such mines in any manner he thinks proper. And as, by excepting the mines, he, *ipso facto*, excepts the chamber which incloses them,[3] he has a similar right with respect to that chamber, and with respect to the space which the working of the minerals creates. The containing chamber is not purely and solely a species of property which can only be made profitable by the removal of the inclosed minerals; with the incidental [4] rights of using all proper means for obtaining them.[5] It is a species of property which is as free as other property from restrictions as to its mode of user.[6] The grantor may, therefore, use the space created by his previous working of the inclosed minerals as a thoroughfare for the carriage of minerals gotten out of his adjoining land.[7] And if, instead of previously working the Grant in fee excepting mines.

[1] S. 42.

[2] See Wightwick *v.* Lord, 6 H. L. Cas. 236; Miller *v.* Miller, 13 Eq. 267, 268; Thursby *v.* Thursby, 19 *ib.* 395, 413.

[3] See *ante*, p. 8.

[4] See *post*, pp. 451, 452.

[5] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 166, *per* Lords Hatherley, Westbury, and Colonsay. Lord Chelmsford inclined to the opposite view: see pp. 171, 172, 175, 176.

[6] See Proud *v.* Bates, 34 L. J. Ch. 406, 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166; Eardley *v.* Granville, 3 Ch. D. 826, 835; G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 165. See also Bowser *v.* Maclean, 2 De G. F. & J. 420; Ballacorkish, &c., Co., *v.* Harrison, L. R. 5 P. C. 49, 62; Ramsay *v.* Blair, 1 A. C. 701.

[7] See Proud *v.* Bates, 34 L. J. Ch. 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166, 176, 179, 180.

inclosed minerals, and then utilising the space thereby created, he prefers to cut a passage through those minerals for the express purpose of using it, and accordingly to use it, as a thoroughfare for the carriage of other minerals, he is entitled to do so.[1] And what he may do himself, he may, by the grant of wayleaves, authorise an adjoining owner, or any number of adjoining owners, to do.[2] And his rights in respect of drainage and ventilation are, of course, as unlimited as his rights in respect of transport.[3] And if any water is found in his mines, or percolates into them, he is, as owner of the mines, entitled, so long as it remains there, to use it in any way he pleases.[4]

Roads properly made in adjoining strata.

If the word "mines" includes not merely the actual bed in which the minerals lie; but the roads properly made in the adjoining strata for the purpose of reaching and carrying away the minerals, and all proper alterations of such roads subsequently made for the same purpose[5]; the right of user extends to such roads as well as to the space in the actual bed which the working of the minerals creates.[6] The right of user does not, however, extend to roads not so properly made or altered.[7]

Limits of right.

Inasmuch, however, as an exception of the underlying mines is not equivalent to an exception of the subsoil generally,[8] rights of user founded upon an exception of underlying mines are exclusively exercisable within that portion of the subsoil which actually consists of mines; or of roads properly made or altered as above mentioned, and are not exercisable within the intervening or surrounding soil or strata.[9]

Other modes of severance.

Similar principles apply where the owner of land grants it by way of lease, excepting the mines; or where he grants the mines in fee simple, and excepts the surface; or where a severance in fee simple is effected by an Act of Parliament.

Grant or exception of minerals.

Where, however, according to the true construction of the instrument of severance, there is a grant or exception of minerals only, different principles apply. In no such case

[1] See Proud *v.* Bates; Hamilton *v.* Graham (*sup.*).

[2] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 176.

[3] See *ib.* 180.

[4] See Acton *v.* Blundell, 12 M. & W. 354; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62, 63; Ballard *v.* Tomlinson, 29 Ch. D. 123.

[5] As to which, *ante*, pp. 3, 4.

[6] Batten Pooll *v.* Kennedy, 1907, 1 Ch. 267.

[7] *Ib.*

[8] See *ante*, p. 52.

[9] See Ramsay *v.* Blair, 1 A. C. 704.

does the containing chamber form any part of the grant or exception. In no such case, therefore, is the mineral owner entitled to use the minerals for the purpose of carrying through them the minerals gotten in an adjoining mine, or for the purpose of draining or ventilating an adjoining mine. And, if a space is created by the partial working of such minerals, he can only use such space for necessary purposes incident to the working of the remaining minerals. And when the minerals are worked out, his right to use the shell which remains ceases altogether.[1]

Proud v. Bates—Hamilton v. Graham.

Proud v. *Bates* [2] illustrates the principles in question. There a lease made by the lord of a manor of waste land of the manor, then recently inclosed by the lessee, contained an exception of mines and quarries, with full power to win and work the same, with free wayleave and passage to, from, and along the same, on foot, or on horseback and with all manner of carriages. A way, available for the carriage of minerals, lay exclusively within the excepted mines. It was not, however, sufficiently high to admit of a horse moving his head whilst the vehicle to which he was attached was being backed. Under these circumstances the lessor chipped off a part of the rock, which lay above the excepted mines; and claimed a right under the reserved power to carry along the way in its altered state as well minerals worked within the excepted mines, as also minerals within the manor, although not under the demised property. It was contended, that not merely could this claim not be sustained with respect to the way in its altered state, but that it could not be sustained with respect to the way in its original condition. The first contention failed for reasons which will be stated hereafter.[3] The second also failed; the Court holding, that the lord had an absolute right to do what he pleased with the excepted mines, and had, therefore, a right to carry through them minerals from wherever gotten. *Hamilton* v. *Graham* [4] was a similar case, and was similarly decided.[5]

[1] See and consider Bowser *v.* Maclean, 2 De G. F. & J. 415; Proud *v.* Bates, 34 L. J. Ch. 406; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 49; Eardley *v.* Granville, 3 Ch. D. 826, 834, 835; Ramsay *v.* Blair, 1 A. C. 701; Batten Pooll *v.* Kennedy, 1907, 1 Ch. at pp. 265, 266. See *ante*, *p.* 21.

[2] 34 L. J. Ch. 406.

[3] *Post*, pp. 480, 481, 482.

[4] L. R. 2 Sc. & D. 166.

[5] See also Bowser *v.* Maclean, 2 De

(β) *Life Tenancies and Leaseholds—Reversions and Remainders.*

Containing chamber—generally.

It has been already seen, that where a person becomes the tenant for life or years, or from year to year, or even the tenant at will, of lands, he becomes entitled to the right of possession of the subsoil generally ; [1] and that the same principle applies to that particular portion which consists of mines or quarries, to the chamber which incloses those mines or quarries, and to the space or vacuum created by their partial or total working.[2] It follows, that, during the existence of his interest, a tenant for life or years, or from year to year, or at will, of lands has, speaking generally, as absolute a right to use as he thinks proper the mines or quarries beneath or within such lands, the containing chamber, the space or vacuum created by his workings, and the subsoil generally, as if he were the owner in fee simple.[3]

Lease excepting surface.

And where the owner of land grants the mines or quarries therein by way of lease, and excepts the surface, the lessee has a similar right with respect to those mines or quarries, the containing chamber, and the space or vacuum which the working of the minerals creates.[4] No doubt it appears to have been stated in two cases of mining leases, that the lessee did not, according as he worked the minerals, acquire any interest in the space or vacuum thereby created.[5] But in one of them [6] it was probably intended to confine the dictum to a proprietary (as compared with a possessory) interest : for a

G. F. & J. 420 ; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 49 ; Ramsay *v.* Blair, 1 A. C. 701 ; Eardley *v.* Granville, 3 Ch. D. 826 ; Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256.

[1] See *ante*, p. 66.

[2] See *ante*, pp. 66, 67.

[3] See Lewis *v.* Branthwaite, 2 B. & Ad. 437 ; Keyse *v.* Powell, 2 E. & B. 144 ; in connection with Eardley *v.* Granville, 3 Ch. D. 826.

[4] See Yeates *v.* Fisher, November 15th, 1905, *per* Warrington, J. See also Milne *v.* Taylor, 16 L. T. 172, where it was stated, that the lessee of an exhausted mine "might use the mine for any other purpose—to store goods in, for instance," *per* Alderson, B. ; Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256.

[5] See Powell *v.* Aiken, 4 K. & J. 358, *per* Wood, V.-C., where the operative words (so far at least as appears from the report) were "mines, veins, and seams of coal" ; Spoor *v.* Green, L. R. 9 Exch. 109, *per* Cleasby, B., where the operative words were "veins or seams of coal."

[6] Powell *v.* Aiken, *sup.*

stranger who was using the vacuum as an aircourse was, at the instance of the lessee, restrained from continuing to do so. Subject, however, to this, the dicta in question cannot be supported.[1]

[1] See and consider Jegon *v.* Vivian, 6 Ch. 742, 750, 758; *post*, pp. 238—241. As to what the operative words in Powell *v.* Aiken and Spoor *v.* Green should *primâ facie* mean, see *ante*, pp. 8, 9.

CHAPTER IV.

WORKINGS AND USER FOUNDED ON PROPERTY OR POSSESSION—MANORIAL AND CHURCH LANDS—LANDS SUBJECT TO MORTGAGE OR CONTRACT—LANDS OF RAILWAY OR HARBOUR COMPANIES.

a.—WORKINGS—COPYHOLDS AND CUSTOMARY FREEHOLDS.

(*a*) *Copyholder—Open Mines or Quarries.*[1]

Copyholder may work open mines or quarries.

A COPYHOLDER of a manor, having obtained by his grant a grant of the subsoil of his tenement, with all the mines and quarries therein contained,[2] may, if the mines or quarries were open at the date of the grant, dig them and take the profits.[3] On similar grounds, if stones fall by accident on a copyholder's land after it has become such, they belong to the copyholder.[4]

(β) *Copyholder—New Mines or Quarries.*[1]

New mines or quarries—marl.

A copyholder may, it is said, dig for marl; but he ought to lay the marl upon the same copyhold land, and not upon any other land.[5]

General disability—waste.

However, the lord of a manor having, in general, the right of property in the mines and quarries in the copyhold landments,[6] a copyholder cannot, in general, *primâ facie*, open or work mines or quarries therein which were unopened at the date of his grant.[7] For, by so doing, he would commit waste.[8] Where large masses of stone had fallen from time to time from

[1] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[2] *Ante*, pp. 67, 68.

[3] See and consider Peachy *v.* Somerset, 1 Str. 447, 454; Bourne *v.* Taylor, 10 East, 189, 202, 203.

[4] Dearden *v.* Evans, 5 M. & W. 11.

[5] Paston's Case, Winch, 8.

[6] *Ante*, pp. 67, 68.

[7] Winchester *v.* Knight, 1 P. Wms. 406; Bourne *v.* Taylor, 10 East, 189, 196; Rowe *v.* Brenton, Conc. 313; Dearden *v.* Evans, 5 M. & W. 11; Cuddon *v.* Morley, 7 Ha. 202; Bowser *v.* Maclean, 2 De G. F. & J. 419; Salisbury *v.* Gladstone, 9 H. L. C. 708; Hext *v.* Gill, 7 Ch. 713; Eardley *v.* Granville, 3 Ch. D. 826, 833.

[8] Eardley *v.* Granville, *sup.* The dictum to the contrary in Rutland's Case, 1 Sid. 152, cannot be supported.

overhanging cliffs upon the field of a copyhold tenement, and had thereby become partially imbedded in the soil; but there was no evidence to show that any particular portion of them had fallen since the copyholder in question became such; it was, on similar grounds, held, that such stones were the property of the lord.[1] However, a copyholder may, for the sake of disencumbering his land, remove stones therefrom.[2]

Remedies for wrongful workings—forfeiture.

The remedy of forfeiture is open to the lord of a manor whose copyhold tenant wrongfully opens mines or quarries beneath or within the copyhold tenement.[3]

Trover—account—injunction.

The lord may also, in general, as having the right of property in the minerals improperly worked,[4] maintain an action of trover;[5] or he may have an account.[6] He may also, in general, have an injunction to restrain the future wrongful working.[7]

Loss of remedies.

Where the lord of a manor stood by for a long period, and allowed copyholders, without objection on his part, to open and work mines, and expend a large sum of money on mining operations, he was held disentitled to an account prior to the filing of his bill; and he was also held disentitled to an injunction, and was left to his remedy in damages.[8] Mining operations are so uncertain, that if a party, who may be entitled to relief, does not apply for it promptly, it may be inequitable to give it to him.[9] The right to an account is not put an end to by the death of the wrongdoer. The lord may have an account against his estate.[10]

[1] Dearden *v.* Evans, 5 M. & W. 11.

[2] *Ib.*

[3] Hanmer *v.* Chance, 4 De G. J. & S. 636, 637; Eardley *v.* Granville, 3 Ch. D. 833: see Parrott *v.* Palmer, 3 M. & K. 639.

[4] *Ante*, pp. 67, 68.

[5] Winchester *v.* Knight, 1 P. Wms. 406; Parrott *v.* Palmer, 3 M. & K. 644; Eardley *v.* Granville, *sup.* 833: cf. Dearden *v.* Evans, 5 M. & W. 11.

[6] Winchester *v.* Knight, 1 P. Wms. 406; Parrott *v.* Palmer, 3 M. & K. 640; Portland *v.* Hill, 2 Eq. 765. Before the Jud. Acts, unless possession by the lord had been shown, ejectment would have been the proper remedy, and an account would not have lain: see Parrott *v.* Palmer, *sup.* 645.

[7] See Parrott *v.* Palmer, 3 M. & K. 632; Cuddon *v.* Morley, 7 Ha. 207; Greenwich Hospital *v.* Blackett, 12 Jur. 151; Portland *v.* Hill, 2 Eq. 765; and cf. Richards *v.* Noble, 3 Mer. 673. For the form of the account and injunction, see Portland *v.* Hill, Set. 573, 574.

[8] See Parrott *v.* Palmer, 3 M. & K. 643.

[9] See *ib.*

[10] See Winchester *v.* Knight, 1 P. Wms. 407; Phillips *v.* Homfray, 24 Ch. D. 464. As to the latter case, see further, *post*, p. 550.

(γ) *Lord—New Mines or Quarries.*[1]

General disability to work new mines or quarries.

The possession of all mines and quarries in the copyhold tenements being in the copyholders,[2] the lord has not, *primâ facie*, any right to enter upon a copyhold tenement in order to bore for or work any new mines or quarries therein.[3] And, as it has been already seen,[4] that the copyholder is, *primâ facie*, under a similar disability, it follows that, where there is no custom in a manor to regulate the rights of the parties, neither the copyholder without licence of the lord, nor the lord without licence of his copyholder, can open and work new mines or quarries beneath or within the copyhold tenement.[5]

Remedies for wrongful workings—trespass—account.

A copyholder may, in general, maintain trespass against his lord for wrongfully entering upon the copyhold and working the mines or quarries;[6] or he may have an account.[7] And these remedies are open to him, although he may be only a reversioner.[8]

Measure of damages.

It has been decided, that the damages to which a copyholder is entitled are the gross amount produced by the sale of the minerals, less the expenses of the working and of the sale, and less such a sum by way of profit as would have induced a third person to undertake the working.[9] But the decision was apparently disapproved of when the same case was before the Court of Appeal, as being too favourable to the copyholder.[10]

Injunction.

A copyholder may also, in general, whether he is entitled in possession or reversion, have an injunction.[11] Before, however, an interlocutory injunction will be granted, where the working of a mine has been actually commenced, the copyholder must

[1] As to new mines or quarries, see *ante*, pp. 55 *et seq.*

[2] *Ante*, pp. 67, 68.

[3] See Player *v.* Roberts, Sir W. Jones, 243; Gilb. on Ten. 327; Townley *v.* Gibson, 2 T. R. 707; Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; Bourne *v.* Taylor, 10 East, 189; Rowe *v.* Brenton, Conc. 313, 8 B. & C. 766; Whitechurch *v.* Holworthy, 4 M. & S. 340; Salisbury *v.* Gladstone, 9 H. L. C. 708; Portland *v.* Hill, 2 Eq. 780; Hext *v.* Gill, 7 Ch. 713; Eardley *v.* Granville, 3 Ch. D. 832; A.-G. *v.* Tomline, 5 Ch. D. 750.

[4] *Ante*, p. 106.

[5] See Winchester *v.* Knight, 1 P. Wms. 406; Bourne *v.* Taylor, *sup.*; Rowe *v.* Brenton, *sup.*; Hilton *v.* Granville, 1 Cr. & Ph. 294; Salisbury *v.* Gladstone, *sup.*; Aspden *v.* Seddon, 1 Exch. D. 510.

[6] Player *v.* Roberts, *sup.*; Bourne *v.* Taylor, *sup.*; Eardley *v.* Granville, 3 Ch. D. 833.

[7] A.-G. *v.* Tomline, *sup.*

[8] *Ib.* 761.

[9] See *ib.* 750.

[10] *Ib.* 15 Ch. D. 150, 153, 154.

[11] Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; A.-G. *v.* Tomline, 5 Ch. D. 750.

show clearly that the lord has no right to work. Except in clear cases, the Court is reluctant to restrain the further working of a mine, the working of which has been actually commenced, on account of the serious injury and inconvenience which may be thereby caused.[1]

(δ) *Customary Freeholds.*

Customary freeholds.

The right of property in mines or quarries beneath or within customary freeholds being in the lord, and the possession being in the tenant,[2] precisely the same rights and disabilities exist with respect to the working of the mines and quarries as exist with respect to the working of mines and quarries in copyhold tenements.[3]

b.—WORKINGS—WASTES.

Lord has general right to work.

The lord of a manor, having the right of property in the mines and quarries beneath or within the waste or common of the manor,[4] may, *primâ facie*, open mines, or dig brick earth, gravel, marl, or loam, therein.[5] And he may work or dig either for his own use or for the purpose of sale.[6] And he may, it would seem, authorise any other person, not being a lessee, to do so.[7] His rights in these respects proceed from his right of property in the soil, and are independent of the Statute of Merton.[8] Indeed, they are outside the purview of the statute; the space produced by the digging not being inclosed.[9]

But must leave sufficient common.

The lord cannot, however, do anything destructive of common rights.[10] He must, therefore, *primâ facie*, in working his

[1] Grey *v.* Northumberland, *sup.*; see also *ante*, p. 98, n.[5], and other cases there cited.

[2] *Ante*, pp. 68, 69.

[3] See Winchester *v.* Knight, 1 P. Wms. 406; Portland *v.* Hill, 2 Eq. 765, 777: see as to copyholds, *ante*, pp. 106 *et seq.*

[4] *Ante*, p. 69.

[5] See Filewood *v.* Palmer, 5 Vin. Abr. pp. 8, 33; Mosely, 172; Place *v.* Jackson, 4 D. & Ry. 318; Hall *v.* Byron, 4 Ch. D. 667, 675; Robinson *v.* Duleep Singh, 11 Ch. D. 798, 815, 830, 831; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 308. The dicta to the contrary in Bullen and Sheene's Case, Godb. 343; Geo. *v.* Cother, Sid. 106; and Buccleuch *v.* Wakefield, L. R. 4 H. L. 410; cannot be supported.

[6] Hall *v.* Byron, *sup.* 680.

[7] Lascelles *v.* Onslow, 2 Q. B. D. 433, 450.

[8] 20 H. 3, c. 4: see Hall *v.* Byron, *sup.* 675; Robinson *v.* Duleep Singh, *sup.* 831; Bell *v.* Love, 10 Q. B. D. 559.

[9] Robinson *v.* Duleep Singh, *sup.* 831.

[10] See 3 Cruise, 85.

mines or quarries, or digging his earth or gravel, leave sufficient common for his commoners.[1] And he is probably liable, if his commoners' beasts, for want of sufficient fences, fall into pits dug by him in the waste.[2] But the fact, that, for any substantial period, there has been a sufficiency of common, is *primâ facie* evidence, that an actual sufficiency has been left.[3] And, in every case, the onus lies on the commoners to show that the lord is availing himself unduly of his rights.[4]

Injunction where workings wrongful.

An injunction will issue where the lord wrongfully claims the right, although he denies any present intention, to do the act complained of.[5] The County Court has jurisdiction to grant an injunction, subject to an appeal by any person aggrieved to the High Court; but the jurisdiction does not abridge or interfere with other existing remedies.[6]

c.—WORKINGS—CHURCH LANDS.

Archbishop or bishop.

Independently of the Act 23 & 24 Vict. c. 124, an archbishop or bishop may work mines or quarries beneath or within the ancient lands of his see, and lawfully open at the time when his title commenced; and may apply the produce to his own use.[7] But he cannot open or work new mines or quarries.[8] However, his rights as regards open mines or quarries can hardly be exercised at the present day. For the Act 23 & 24 Vict. c. 124, provided that, on every avoidance of a see after the passing of the Act, the lands of the see (with certain

[1] See Filewood *v.* Palmer, Mosely, 172; Melm. MSS. E. 53 Linc. Inn Library, "The lord is absolutely entitled to the mine, provided he leaves sufficient common." See also Arlett *v.* Ellis, 7 B. & C. 346; Wakefield *v.* Buccleuch, 4 Eq. 613; Buccleuch *v.* Wakefield, L. R. 4 H. L. 407; Hall *v.* Byron, *sup.*; Lascelles *v.* Onslow, *sup.* 449; Robinson *v.* Duleep Singh, *sup.* 830, 831; Love *v.* Bell, 9 A. C. 292; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424, 425; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 308, 310, 318, 319, 320.

[2] See Bullen and Sheene's Case, *sup.*; Robinson *v.* Duleep Singh, 11 Ch. D. 831, 832.

[3] See Robinson *v.* Duleep Singh, 11 Ch. D. 830.

[4] Hall *v.* Byron, 4 Ch. D. 667, 680, *per* Hall, V.-C.; Bell *v.* Love, 10 Q. B. D. 559. The onus would be upon the lord, if the act complained of were approvement by him: see *post*, p. 173.

[5] Hall *v.* Byron, 4 Ch. D. 679, 680. For the form of such injunction, and of a decree quieting the title of commoners to rights of common, see *ib.* 680, 681.

[6] 39 & 40 Vict. c. 56, s. 30.

[7] See Knight *v.* Mosely, Amb. 176.

[8] *Ib.* As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

exceptions) should vest absolutely in the Ecclesiastical Commissioners.[1]

Dean and Chapter.

A Dean and Chapter had, at common law, power to work all mines and quarries beneath and within the corporate lands, and to appropriate the produce.[2] However, since the passing of the Acts known as the Restraining Acts,[3] it has always been held that their common law right no longer existed.[4]

Parson may work open mines or quarries.

A parson [5] may work open mines or quarries,[6] and apply the produce to his own use ; [7] and none the less [8] because of the Act 5 & 6 Vict. c. 108.[9]

Limited rights as respects new mines or quarries.

A parson may open a new quarry and dig stones therein for the purpose of repairs.[10] Or he may sell the stones for the purpose of applying the money in repairs actually about to be done, if the stones themselves cannot be conveniently used for that purpose.[11] But, except for repairs, a parson cannot open and work new mines or quarries.[12] His position is that of a tenant for life impeachable of waste.[13] And the consent of his patron or patrons and ordinary will not enable him to do so.[14] He had, it is true, at common law, with the consent of the patron and the ordinary ; [15] or (if there were both a patron paramount and an immediate patron) with the consent of the patron paramount, the immediate patron, and the ordinary ; [16] an

[1] S. 2.

[2] See Ross *v.* Adcock, L. R. 3 C. P. 664.

[3] 13 Eliz. c. 10 ; 13 Eliz. c. 20 ; 14 Eliz. c. 11 ; 14 Eliz. c. 14.

[4] See Ross *v.* Adcock, *sup.*

[5] Where glebe lands are vested in a parson or vicar, the inheritance is in abeyance : Huntley *v.* Russell, 13 Q. B. 588 ; Eccles. Comms. *v.* Wodehouse, 1895, 1 Ch. 564.

[6] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[7] Knight *v.* Mosely, Amb. 176 ; Huntley *v.* Russell, 13 Q. B. 572, 591 ; Marlborough *v.* St. John, 5 De G. & Sm. 179 ; Bartlett *v.* Phillips, 4 De G. & J. 414 ; Ross *v.* Adcock, L. R. 3 C. P. 665.

[8] See Eccles. Comms. *v.* Wodehouse, *sup.* 556.

[9] As to which, see *post*, p. 201.

[10] Knight *v.* Mosely, Amb. 176.

[11] *Ib.*

[12] Knight *v.* Mosely, Amb. 176 ; Marlborough *v.* St. John, 5 De G. & Sm. 179 ; Bartlett *v.* Phillips, 4 De G. & J. 414 ; Holden *v.* Weekes, 1 J. & H. 278 ; Ross *v.* Adcock, L. R. 3 C. P. 664. The dictum to the contrary in Rutland's Case, 1 Lev. 107, 1 Sid. 152, 1 Keb. 557 ; proceeding on the alleged ground, that, if a parson were restrained from digging new mines in his glebe, no mines in any glebe could be opened ; is unsustainable.

[13] See Marlborough *v.* St. John, 5 De G. & Sm. 178 ; Eccles. Comms. *v.* Wodehouse, 1895, 1 Ch. 562. See *ante*, p. 90.

[14] Eccles. Comms. *v.* Wodehouse 1895, 1 Ch. 552, 562, 563. The headnote to the contrary in Marlborough *v* St. John, *sup.* 174, is wrong.

[15] Holden *v.* Weekes, 1 J. & H. 284.

[16] Doe *v.* Collinge, 7 C. B. 939.

unlimited power of alienating the glebe lands, and, *à fortiori*, an unlimited power of opening new mines and quarries. But the Restraining Acts [1] deprived him of these powers.[2] And the difficulty of his position cannot, it is submitted, be overcome by obtaining the sanction of the Court; the Court not having, it is submitted, any authority to give such sanction.[3]

Remedies for wrongful workings—account.

The better opinion seems to be, that, if minerals have been improperly worked by a parson or vicar, the patron may have an account.[4] Assuming the correctness of this opinion, the amount, for which the wrongdoer is bound in respect of them to account,[5] will be invested for the benefit of the advowson.[6] It is presumed, however, that the wrongdoer would not be allowed to receive the income.[7]

Dilapidations.

An action for dilapidations will not lie against the estate of a parson or vicar at the suit of his successor in respect of gravel dug or minerals worked in the glebe.[8] For (1) the successor is not injured, as he could not have worked, even if the previous working had not taken place. And (2) an action for dilapidations lies not merely for voluntary, but for

[1] *Ante*, pp. 110, 111.

[2] Eccles. Comms. *v.* Wodehouse, *sup.*: see also Mulliner *v.* Mid. R. Co., 11 Ch. D. 623. Previously to the decision in Eccles. Comms. *v.* Wodehouse the law on this point was doubtful: see Bartlett *v.* Phillips, 4 De G. & J. 414; Holden *v.* Weekes, *sup.*

[3] The power to sanction the cutting of particular clumps of timber in a due course of management (Marlborough *v.* St. John, *sup.* 179) does not, it is submitted, furnish any analogy upon this point. No doubt, in Holden *v.* Weekes (*sup.* 284), V.-C. Wood seems to have thought, that the principle applicable to timber might apply to mines; but he abstained from applying it, and directed an inquiry to ascertain what steps were necessary to obtain the proper sanction: see the decree, 287. See and consider *Re* Smith, 10 Ch. 85; *ante*, pp. 83, n. [1], 93. Powers to sell and lease may be exercised under various statutory provisions: see *post*, pp. 169, 170, 200—205.

[4] Sowerby *v.* Fryer, 8 Eq. 423, *per* James, V.-C. See also Bartlett *v.* Phillips, 4 De G. & J. 414. The law was laid down the other way by Lord Hardwicke in Knight *v.* Mosely, Amb. 176; and this was acquiesced in by Wood, V.-C., in Holden *v.* Weekes, 1 J. & H. 278, 286: but, as James, V.-C., observed in Sowerby *v.* Fryer, *sup.*, it is not easy to understand upon what grounds. Cf. Ross *v.* Adcock, L. R. 3 C. P. 665. For the form of the account which will be directed, see Holden *v.* Weekes, *sup.* 287.

[5] See *post*, pp. 537 *et seq.*

[6] See Bartlett *v.* Phillips, *sup.*; Holden *v.* Weekes, *sup.* 286, 287. See, however, Ross *v.* Adcock, *sup.*

[7] For the form of the declaration which in such a case will be made, see Holden *v.* Weekes, *sup.* 287.

[8] Ross *v.* Adcock, *sup.* 655, 669, *et seq.*; overruling the law supposed to have been laid down in Huntley *v.* Russell, 13 Q. B. 572.

permissive waste; and each incumbent is liable for the waste of his predecessor. If, therefore, such an action lay in respect of minerals, the estate of an incumbent would be liable, not merely in respect of minerals raised in his time, without his permission or knowledge, from mines extending, without his knowledge, under the glebe; but it would also be liable in respect of minerals so raised by any number of his predecessors. And in such an action the Statute of Limitations would afford imperfect protection; the waste being permissive and continuing.[1]

Injunction or prohibition.

If a parson or vicar improperly works, the patron may have an injunction or a prohibition to restrain the future working.[2] And if the patron colludes with the parson or vicar in committing waste, the ordinary may have an injunction.[3] The Ecclesiastical Commissioners may also have an injunction.[4] Indeed, it has been said, that even the Metropolitan or the Crown may, in case of need, interfere to prevent waste by a parson.[5] The Courts have always been anxious to allow any person who has an interest (however small) to come forward in such cases.[6]

Deprivation.

A parson or vicar who improperly works may also be punished in the Ecclesiastical Court by deprivation.[7]

d.—WORKINGS—LANDS SUBJECT TO MORTGAGE.

(*a*) *Mortgagor.*

Manager.

A mortgagee of a leasehold colliery may usually, in foreclosure proceedings, obtain an order for a manager as well as a receiver.[8]

[1] Ross *v.* Adcock, *sup.* 664, 665, 670.

[2] Knight *v.* Mosely, Amb. 176; Holden *v.* Weekes, 1 J. & H. 278, 285; Ross *v* Adcock, L. R. 3 C. P. 664.

[3] Holden *v.* Weekes, 1 J. & H. 278, 285.

[4] Eccles. Comms. *v.* Wodehouse, 1895, 1 Ch. 552, 564, 565.

[5] Ross *v.* Adcock, L. R. 3 C. P. 669; Eccles. Comms. *v.* Wodehouse, *sup.* 564, 565.

[6] Eccles. Comms. *v.* Wodehouse, *sup.* 565. In Holden *v.* Weekes, 1 J. & H. 285, Wood, V.-C., stated, that the patron was in general the only person who could properly interfere. But this was probably not meant literally (see Eccles. Comms. *v.* Wodehouse, *sup.* 565, *per* Romer, J.); and, if it was, is inconsistent with the other cases already cited.

[7] Ross *v.* Adcock, *sup.* 664.

[8] County of Gloucester Bank *v.* Rudry, &c., Co., 1895, 1 Ch. 629.

(β) *Mortgagee.*

Mortgagee may work open mines or quarries.

The mortgagee in possession of mines or quarries open [1] at the time he entered may, if he pleases, continue the working of them.[2] And, if they were open when he entered, it is immaterial whether the opening took place before or after the date of his mortgage. An opening of a mine or quarry by a person who is still in actual possession, although after he has executed a mortgage, will enure for the benefit of the mortgagee.[3] And, of course, a working under a lease granted by the mortgagor will, for this purpose, be the same as a working by the mortgagor himself.[4] Indeed, a mortgagee in possession of mines or quarries open at the time he entered must in ordinary cases, in order to prevent loss to the property, continue the working of them.[5]

But he may not, *primâ facie*, speculate.

A mortgagee in possession of open mines or quarries cannot, however, be compelled by his mortgagor to advance more money in working them than a prudent owner would do; no matter how probable it may be that they would be improved by a large expenditure.[6] For he is not, *primâ facie*, in the same position as an absolute owner. If he were an absolute owner, he might speculate as much as he pleased. He would, no doubt, have to bear the loss, if he were unfortunate; but he would, on the other hand, reap all the advantages, if he were successful. But if a mortgagee of a mine or quarry makes a profit by working it, that profit must, *primâ facie*, go towards discharging his mortgage debt; whereas, if he incurs a loss, he must, *primâ facie*, bear that loss himself.[7] Of course, however, the *primâ facie* position of a mortgagee, as regards incurring a loss, may be controlled by express agreement.[8]

Receiver and manager.

A mortgagor of mines or quarries may sometimes, having regard to the fact that the mortgagee in possession is their legal owner, obtain an order for a receiver and manager against him. The Court will not, however, appoint a receiver against a mortgagee in possession, who alleges that he is still unpaid,

[1] As to open mines or quarries, see *ante*, pp. 55 *et seq.*

[2] See Elias *v.* Snowdon, &c., Co., 4 A. C. 454, 460.

[3] *Ib.*

[4] *Ib.*

[5] See Rowe *v.* Wood, 2 J. & W. 555, 556; County of Gloucester Bank *v.* Rudry, &c., Co., 1895, 1 Ch. 638.

[6] Rowe *v.* Wood, *sup.*

[7] See *ib.*

[8] See, *e.g.*, Norton *v.* Cooper, 25 L. J. Ch. 121; S. C. 5 De G. M. & G. 728.

unless some particular and specified kind of mismanagement is proved against him.[1]

Just allowances.

In taking the accounts under a decree in a redemption action against a mortgagee in possession of mines or quarries, the mortgagee is, under the head of "just allowances," entitled to be recouped all moneys which he has expended upon necessary repairs. But to entitle him in respect of permanent improvements, or substantial repairs, he must make out a case for them at the trial.[2]

Mortgagee not bound to work new mines or quarries.

A mortgagee, who is in possession of land containing unopened [3] mines or quarries, is not bound to open and work them. He is not bound to engage in speculations for the benefit of the mortgagor.[4]

Nor entitled to do so unless security insufficient.

On the other hand, a mortgagee, who is in possession of land containing unopened mines or quarries, and whose security is not insufficient, is not entitled, *primâ facie*, to open and work them.[5] The reason is, that a mortgagee, who opens and works new mines or quarries, destroys a part of the inheritance, which the mortgagor, when he comes to redeem, should be entitled to get back.[6] And a mortgagee whose security is not insufficient, and who authorises strangers to work, is, although not in possession himself, responsible for their acts.[7]

Remedies for wrongful workings.

If such a mortgagee opens and works new mines or quarries, the mortgagor may, of course, charge him with his receipts.[8] And he will be disallowed the costs both of working and winning, and of bringing to bank; [9] his speculations being at his own hazard.[10] And the Statute of Limitations will not avail him

[1] Rowe *v.* Wood, 2 J. & W. 555—558.

[2] Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co., 7 Ch. D. 192.

[3] As to new mines or quarries, see *ante*, pp. 55 *et seq.*

[4] See Hughes *v.* Williams, 12 Ves. 493, 496, *per* Lord Erskine.

[5] Thorneycroft *v.* Crockett, 16 Sim. 445; Hood *v.* Easton, 2 Giff. 692, 2 Jur., N. S. 917; Millett *v.* Davey, 31 Beav. 470, 475.

[6] See Thorneycroft *v.* Crockett, *sup.*; Hood *v.* Easton, 2 Giff. 697; Millett *v.* Davey, *sup.* 475, 476.

[7] Hood *v.* Easton, 2 Giff. 692.

[8] Hughes *v.* Williams, *sup.*; Thorneycroft *v.* Crockett, *sup.*; Hood *v.* Easton, *sup.*; Millett *v.* Davey, *sup.* 470, 475: see also Farrant *v.* Lovel, 3 Atk. 723.

[9] Hughes *v.* Williams, *sup.*; Thorneycroft *v.* Crockett, *sup.*; Hood *v.* Easton, *sup.*; Millett *v.* Davey, *sup.* 476. For the form of the account, see Hood *v.* Easton, 2 Giff. 701. Cf. *post*, pp. 537 *et seq.*

[10] Hughes *v.* Williams, 12 Ves. 493 496.

as a defence; the workings being in the nature of a breach of trust.[1] The mortgagor may sometimes also charge him with an occupation rent.[2]

Entitled to do so if security insufficient.

If, however, a mortgagee in possession can show that his security is insufficient, he will, acting *bonâ fide*, be allowed to open and work new mines or quarries; accounting, of course, to the mortgagor for the profits which he receives.[3] And his liability to account will usually be confined to such profits. He will not be liable to account either for the value of the ore raised, or for the damage to the soil; at all events where the mortgagor has known of the working, and, without remonstrance or complaint, has allowed it to proceed for several years.[4] The onus, however, lies on the mortgagee to show that the security is insufficient.[5] But the fact, that his interest was in arrear when he commenced to work, will usually go far to discharge that onus.[6] And in such a case, it will usually be vain for the mortgagor to say, that the property, including the mines or quarries, might have been sold, and a surplus obtained; especially if the workings have not in fact been profitable.[7]

But may not speculate.

As in the case of a mortgagee who continues the working of open mines or quarries,[8] a mortgagee, who opens and works new mines or quarries, cannot, even if his security be insufficient, charge his mortgagor with any losses incurred in the workings.[9]

Wanton or destructive waste.

Whether the security of a mortgagee in possession is, or is not, insufficient, he will be restrained from working mines or quarries so as to commit wanton or destructive waste.[10]

Mortgagee who is also lessee.

Where a mortgagee is also a lessee under his mortgagor of the same mines; and he removes pillars, which a covenant in his lease obliged him to leave; he will not be allowed to shelter himself under his character of mortgagee; and, in taking the

[1] See Hood *v.* Easton, 2 Giff. 692, 2 Jur., N. S. 917.

[2] For the form of an inquiry and direction which will in such a case be made, see Jeanes *v.* Hutchings, Set. 1960; Thorneycroft *v.* Crockett, 16 Sim. 445.

[3] Millett *v.* Davey, 31 Beav. 470, 476, 477.

[4] *Ib.* 477. In that case the mortgagor had stood by for four years.

[5] Millett *v.* Davey, *sup.* 473—475.

[6] *Ib.*

[7] *Ib.* 474.

[8] See *ante*, p. 114.

[9] Millett *v.* Davey, 31 Beav. 476.

[10] Millett *v.* Davey, *sup.* As to rent-charges, see 44 & 45 Vict. c. 41, s. 44. For the position of the mortgagee of a partner, see *post*, pp. 141, 142.

accounts against him, he will be liable on the same footing as if he were being sued on the covenant.[1]

e.—WORKINGS—LANDS SUBJECT TO CONTRACT.

Workings by vendor.

A purchaser is entitled, *primâ facie*, to the subject-matter of the contract as from the date of the contract. If, therefore, subsequently to the contract, the vendor works and removes minerals out of the land in question, he will be liable in respect of the proceeds.[2]

Workings by purchaser or lessee.

On the other hand, where the purchaser of a mine or quarry is, before conveyance, allowed into possession, and commences to work, he will be ordered, on motion, to pay his purchase-money into Court.[3] In the same way, a person, who has entered into possession under a contract for a lease, and worked, will be ordered to pay into Court the rents due under the contract, if there is no question as to his ultimate liability in respect of them.[4] But, if there is a question as to his ultimate liability, such an order will not be made.[5] Where the vendor or lessor is entitled to the order, it will be made without giving the other party an option to go out of possession.[6] A purchaser may also be restrained if his working is shown to be lessening the security. The vendor being entitled to the usual vendor's lien, the purchaser occupies the same position as a mortgagor in possession.[7]

f.—WORKINGS—LANDS OF RAILWAY, WATERWORKS, OR HARBOUR COMPANIES.

General disability to work.

Although it is lawful for a railway or waterworks or harbour company to acquire mines,[8] it is, *primâ facie*, *ultra vires* of such a company to work them as a part of their regular operations.[9] But where a railway company keep lands under the

[1] Taylor *v.* Mostyn, 33 Ch. D. 226. As to his liability under the covenant in the lease, see *post*, pp. 256, 257.

[2] Nelson *v.* Bridges, 2 Beav. 243; Brown *v.* Dibbs, 25 W. R. 776; Leppington *v.* Freeman, 40 W. R. 348, affirmed 66 L. T., N. S. 357.

[3] Buck *v.* Lodge, 18 Ves. 450.

[4] Lewis *v.* James, 32 Ch. D. 326.

[5] *Ib.*

[6] *Ib.*

[7] See Crockford *v.* Alexander, 15 Ves. 138.

[8] See *post*, pp. 161 *et seq.*

[9] Lyde *v.* Eastern Bengal R. C., 36 Beav. 10, 16, 17; A.-G. *v.* G. N. R., 1 Dr. & Sm. 154; Eccles. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 855, 856; A.-G. *v.* G. E. R., 11 Ch. D. at p. 484; Dixon *v.* Caledonian, &c., Co., 5

belief, whether rightly or wrongly, that they will use them at a future time, they may in the meantime utilise them by working the minerals thereunder.[1]

g.—USER—COPYHOLDS.

Lord may not, *primâ facie*, use surface or subsoil.

It has been already seen, that upon a grant of copyholds the right of possession both of the surface and of the subsoil generally, with all the mines or quarries therein contained, becomes vested in the copyholder; and that the same principle applies to the chamber which contains those mines or quarries, and to the space or vacuum created by their partial or total working.[2] It follows, that the lord of a manor is not entitled, *primâ facie*, to dig pits upon the surface of the copyholds for the purpose of working the mines;[3] or to deposit earth or rubbish upon such surface;[4] or to use any part of such surface or of the subsoil as a tramway or railway for the carriage of minerals.[5]

Carriage of foreign minerals.

For similar reasons, although the lord of a manor may have a right, founded on grant or custom,[6] to use a portion of the subsoil for the carriage of minerals gotten from the manorial mines, he has not, *primâ facie*, any right to use that portion for the carriage of minerals gotten in an adjoining mine. And if the lord, in exercise of a customary right to work the manorial mines and carry away the minerals, creates a space by his workings, he is not entitled, *primâ facie*, to carry along such space minerals gotten in an adjoining mine.[7] The right of user of such space belongs to the copyholder. "He is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the copyholder may descend in the shaft,

A. C. 833; Glasgow *v.* Farie, 13 A. C. 697; L. & N. W. R. *v.* Howley Park, &c., Co., 1911, 2 Ch. 119, 120. Cf. Mulliner *v.* Mid. R. Co., 11 Ch. D. 622, 623.

[1] See and consider Hooper *v.* Bourne, 5 A. C. 22, *per* Lord Blackburn.

[2] *Ante*, p. 68.

[3] See Player *v.* Roberts, Sir W. Jones, 243; Townley *v.* Gibson, 2 T. R. 707; Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; Bourne *v.* Taylor, 10 East, 189; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 59.

[4] See Ballacorkish, &c., Co., *v* Harrison, *sup.* 59, 60.

[5] See Holden *v.* Hargreaves, Set. 577.

[6] See *post*, pp. 133, 134.

[7] See Bowser *v.* Maclean, 2 De G. F. & J. 415; Proud *v.* Bates, 34 L. J. Ch. 411; Eardley *v.* Granville, 3 Ch. D. 826, 833; Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256.

and either walk about in the space below, or use it for any other rational purpose." [1]

Bowser v. Maclean—Eardley v. Granville.

Bowser v. *Maclean* [2] and *Eardley* v. *Granville* [3] were decided in accordance with these principles. In the latter case Earl Granville was the lessee of certain manorial mines, with a right to work them, and, for that purpose, to enter on the surface of the copyholds; and he worked these mines by means of a pit sunk beneath a copyhold tenement of the manor. Between such pit and a station of the North Staffordshire Railway Co. lay: (1) another copyhold tenement of the manor, in the possession of the plaintiffs; (2) a freehold of Ralph Sneyd; and (3) a freehold of the plaintiffs. The Earl was also the lessee both of the mines under the Sneyd freehold, and of a part of the plaintiff's freehold. He drove a crut from the Sneyd mines under the plaintiffs' copyhold to the pit, and proceeded to carry the minerals from the Sneyd mines along such crut through the pit to the surface, and thence, by a railway, over the copyhold of the plaintiffs, the freehold of Sneyd, and the freehold of the plaintiffs, to the railway station. He was held not entitled to carry the Sneyd minerals either under or over the plaintiffs' copyhold.

[1] Eardley *v.* Granville, 3 Ch. D. 833, *per* Jessel, M. R.

[2] 2 De G. F. & J. 415.

[3] 3 Ch. D. 826.

CHAPTER V.

WORKINGS AND USER, FOUNDED ON CUSTOM, PRESCRIPTION, AND STATUTE.[1]

a.—WORKINGS—PROFITS *À PRENDRE.*

(*a*) *Custom.*[2]

Right of profit *à prendre* not in general claimable by custom.

No right of profit *à prendre in alieno solo* can (except in the special instances which will be presently adverted to [3]) be claimed by custom.[4] Accordingly, an alleged right in all the inhabitants for the time being of a particular parish occupying messuages and lands within the parish to take sand which had been drifted upon a particular close from the sea-shore ; [5] or in the inhabitants of a township to take stones from the land of another person for the purpose of cultivating and improving their land, or for the purpose of repairing highways ; [6] or in a surveyor [7] or overseer [8] of highways to take stones from the land of another for the purpose of repairing highways ; [9] or in the Forester of the Crown in a particular place within the Forest of Dean to grant gales of the Crown quarries therein without accounting to the Crown for the proceeds ; [10] cannot have any legal foundation in custom.[11] And it is immaterial, however ancient, uniform, and clear the exercise of the custom may be.[12]

Exception in case of manorial wastes.

An exception to the rule has, however, been admitted in the

[1] The general law only is here stated. With respect to workings and user under local customs and statutes, see the 3rd edition of this book, Chaps. XIX., XX., and XXI.

[2] Custom is a local usage, annexed to a particular place ; prescription is a personal privilege, annexed to a particular person.

[3] *Infra*, pp. 121, 122.

[4] Gateward's Case, 6 Rep. 59 b.

[5] Blewett *v.* Tregonning, 3 A. & E. 554 ; A.-G. *v.* Mathias, 4 K. & J. 591.

[6] Constable *v.* Nicholson, 14 C. B., N. S. 230.

[7] Padwick *v.* Knight, 7 Exch. 854.

[8] Constable *v.* Nicholson, *sup.*

[9] This may usually be done under statutory powers : see *post*, p. 132.

[10] A.-G. *v.* Mathias, 4 K. & J. 579. See, as to the Forest of Dean, Chap. XX. of the 3rd edit. of this book.

[11] See also Goodman *v.* Saltash, 7 A. C. 641, 648, 654—662, 669.

[12] See A.-G. *v.* Mathias, *sup.* 590 ; Saltash *v.* Goodman, 5 C. P. D. 450, 451.

case of manorial wastes. A copyholder for life or inheritance may claim by custom a right of profit *à prendre* in the demesne or waste lands of the manor.[1] A "flux body," such as copyholders, "which has no entirety or permanence," cannot prescribe in its own name and right for a right of profit *à prendre in alieno solo:* nor can it in the lord's name; for he cannot claim common in his own land. As, therefore, it is impossible that it can claim by prescription, it is allowed to do so by custom.[2] So a freehold or copyhold tenant of a manor may claim by custom a right to get stone from a quarry on the waste.[3]

But right subject to restriction.

However, an ancient common of turbary can only, where claimed by custom, be claimed in respect of an ancient house or building or a house standing in place of it,[4] and for the purpose of being spent or consumed thereon.[5] And so, in other cases of rights of profit *à prendre*, the right cannot be claimed without restriction. Thus alleged rights by custom in the copyholders of a manor having gardens parcels of their customary tenements to take turf from the common of the manor at all times of the year, as often and in such quantity as occasion required, for specific repairs and improvements on such customary tenements, have been held bad; as too uncertain and indefinite.[6] And, independently of ancient common of turbary, an alleged right by custom in the copyholders of a manor must apparently, to be valid, be confined to necessary consumption and repairs upon the ancient copyholds.[7] One, who improperly exercises a right of profit *à prendre*, commits waste, and may be restrained by injunction.[8]

Occupant.

Whether or not it be possible, not only for a copyhold tenant, but for the mere occupant of a copyhold tenement, to claim

[1] See Gateward's Case, 6 Rep. 60 b.; Duberley *v.* Page, 2 T. R. 391; Shakespear *v.* Peppin, 6 *ib.* 741; Rogers *v.* Brenton, 10 Q. B. 60; A.-G. *v.* Hanmer, 27 L. J. Ch. 841; Portland *v.* Hill, 2 Eq. 765, 780; Warrick *v.* Queen's Coll., Oxford, 6 Ch. 724.

[2] See Rogers *v.* Brenton, 10 Q. B. 61, 62, *per* Lord Denman.

[3] Heath *v.* Deane, 1905, 2 Ch. 86.

[4] See Clarkson *v.* Woodhouse, 5 T. R. 414, n., 415, n.; Warrick *v.* Queen's Coll., Oxford, 6 Ch. 730.

[5] Ely *v.* Warren, 2 Atk. 190. See Heath *v.* Deane, *sup.*

[6] See Wilson *v.* Willes, 7 East, 121: see also Rogers *v.* Brenton, 10 Q. B. 26, 57, 60; and cf. Clayton *v.* Corby, 5 *ib.* 415.

[7] See Peppin *v.* Shakespear, 6 T. R. 748; A.-G. *v.* Hanmer, 27 L. J. Ch. 841.

[8] See Ely *v.* Warren, *sup.*

by custom a right of profit *à prendre* in the waste of the manor,[1] it is at all events certain that an ancient common of turbary cannot be claimed by a mere occupant.[2]

Manorial wastes—evidence of custom.

Evidence as to neighbouring manors is not, in general, admissible to show the custom in the particular manor; every manor being governed by its own customs.[3] But in the case of manors having a great physical similitude, such as those in the fen districts, a copyholder of the particular manor, claiming the right to dig the soil of the common for turf, may adduce evidence as to the existence of a similar right in the neighbouring manors.[4] So in the mining districts of Cornwall and Derbyshire, where the local customs prevail, evidence of what has taken place in one manor may, it seems, be admitted for the purpose of explaining or showing the custom in another.[5] General evidence of reputation is probably admissible in support of a customary right of digging stones on the lord's waste.[6] A custom pleaded for the tenant of a particular tenement was not allowed to be proved by evidence of a general custom for all the copyholders to the same effect.[7] An old entry in the court rolls presenting, that the freeholders had a right to get stone from the waste, to be used on their tenements, is good evidence of the custom; whether the lord is shown to have agreed to the presentment or not.[8]

Public good.

A custom for freemen and proprietors of ships within a borough to dig gravel on the shore for ballast has also been held to be good; as being for the maintenance of navigation.[9]

(β) *Prescription.*

Right of profit *à prendre* in general claimable by prescription.

A right of profit *à prendre in alieno solo* may generally[10] be claimed by prescription.[11] It has, accordingly, been

[1] See Ely *v.* Warren, *sup.*, 189, 190.
[2] *Ib.* 190.
[3] *Ib.*, 2 Atk. 189.
[4] *Ib.*
[5] *Ib.* As to these local customs, see Chaps. XIX., XXI. of the 3rd edition of this book.
[6] See Morewood *v.* Wood, 14 East, 326, n.
[7] Wilson *v.* Page, 4 Esp. 71.
[8] Heath *v.* Deane, 1905, 2 Ch. 86.
[9] See Lynn Regis *v.* Taylor, 3 Lev. 160. See, however, Padwick *v.* Knight, and Constable *v.* Nicholson, *ante*, p. 120, where the custom set up might equally well have been considered *pro bono publico*, and was nevertheless held bad.
[10] For the exception, see *post*, p. 125.
[11] See Gateward's Case, 6 Rep. 60 b.; Hayward *v.* Cunnington, 1 Lev. 231; Blewett *v.* Tregonning, 3 A. & E. 554; Clayton *v.* Corby, 5 Q. B. 415;

considered, that a right to take turf and stones,[1] or coal,[2] in the land of another may be properly claimed by prescription. And the freeholders of a manor may properly claim by prescription a right to cut turf or dig gravel out of the lord's waste.[3] And where the freeholders have, in fact, exercised such a right for many years, the Court will try to find a legal origin therefor.[4] And where such a right has for many years been exercised by the freeholders and also by the inhabitants, the Court will presume that the inhabitants claimed through the freeholders.[5] It is said, that the reason why the right in question may in general be claimed by prescription, but not by custom, is that a prescriptive right, which is personal, may be released; but that a custom, which is local, cannot be released.[6] In the case of the freeholders of a manor, it seems that building on the freehold would be deemed an abandonment of the right.[7] The infringement of the right may be restrained by injunction.[8] And, if the right belongs to the freeholders of a manor, one may sue on behalf of himself and all the others.[9] The County Court has jurisdiction to grant an injunction, subject to an appeal by any person aggrieved to the High Court.[10]

But right subject to restriction.

However, an ancient common of turbary where claimed by prescription, as where claimed by custom,[11] must be claimed in respect of an ancient dwelling-house or a house standing in place of it,[12] and for the purpose of being spent or consumed

A.-G. *v.* Mathias, 4 K. & J. 579; Constable *v.* Nicholson, 14 C. B., N. S. 230; De la Warr *v.* Miles, 17 Ch. D. 535.

[1] See Incledon *v.* Burges, Carth. 65.

[2] See Wilkinson *v.* Proud, 11 M. & W. 33. See also A.-G. *v.* Hanmer, 27 L. J. Ch. 841, where it was said, that freeholders might acquire by prescription a right to get stones and sand from the foreshore to repair their buildings and walls.

[3] See Warrick *v.* Queen's Coll., Oxford, 6 Ch. 734; Betts *v.* Thompson, *ib.* 739; Heath *v.* Deane, 1905, 2 Ch. 93.

[4] Warrick *v.* Queen's Coll., Oxford, 10 Eq. 105, 6 Ch. 716, 722; Betts *v.* Thompson, *sup.* 736; Heath *v.* Deane, *sup.*

[5] *Ib.* Cf. Saltash *v.* Goodman, 5 C. P. D. 431.

[6] See A.-G. *v.* Mathias, 4 K. & J. 591; Goodman *v.* Saltash, 7 A. C. 658. As to custom, see *ante*, p. 120.

[7] Warrick *v.* Queen's Coll., Oxford, 6 Ch. 730.

[8] For the form of the injunction, see Betts *v.* Thompson, Set. 599, 600.

[9] Warrick *v.* Queen's Coll., Oxford, 10 Eq. 105, 6 Ch. 716; Betts *v.* Thompson, 6 Ch. 732.

[10] 39 & 40 Vict. c. 56, s. 30. A claim to a part of the soil of another cannot be sustained by prescription: see Wilkinson *v.* Proud, 11 M. & W. 33.

[11] *Ante*, p. 121.

[12] Warrick *v.* Queen's Coll., Oxford, 6 Ch. 730.

thereon.[1] And so in other cases of rights of profit *à prendre*, where claimed by prescription, the claim must not be without restriction. Where, accordingly, the owner of a brick-kiln claimed a right by prescription to dig and take away from another's close so much clay as was at any time required for making bricks at the brick-kiln in any year and at all times of the year, it was held, that the claim was an indefinite claim to take all the clay out of the close, and was, therefore, bad.[2] And where the Forester of the Crown in a particular place in the Forest of Dean claimed a right by prescription to grant gales of the Crown quarries therein without accounting to the Crown for the proceeds, it was held, that the claim, being in effect a claim to carry away the soil of another without stint or limit, could not be sustained.[3] And it is immaterial, however strong the evidence of the user may be.[4] In other respects also the right claimed has limitations. It has, for instance, been held, that a right for the inhabitants of a township as such to take stones from the land of another person for the purpose of repairing the highway cannot be claimed by prescription; inhabitants as such not being a body capable of taking a grant.[5] It is, however, possible to show by prescription a valid right of cutting turf more extensive than common of turbary; as, for instance, a right of cutting turf in respect of new or additional buildings.[6]

Evidence of right.

An original grant of the right to dig stones out of a common does not necessarily extend to the whole of the common. It may have been either a general grant to dig out of the whole of the common, or a grant to dig except as to the particular part in question. An assertion, therefore, of a prescriptive right to dig stones out of a particular part of a common must be supported by evidence as to user in respect of that part.[7] General evidence of reputation is probably not admissible in

[1] Valentine *v.* Penny, Noy, 145; Hayward *v.* Cunnington, 2 Keble, 290, 311; Williams on Commons, 192.

[2] Clayton *v.* Corby, 5 Q. B. 415: cf. Rogers *v.* Taylor, 1 H. & N. 706; Goodman *v.* Saltash, 7 A. C. 646.

[3] A.-G. *v.* Mathias, 4 K. & J. 579. A claim by custom also failed: see *ante*, p. 120. See also Saltash *v.* Goodman, 5 C. P. D. 431, 448, 449.

[4] A.-G. *v.* Mathias, *sup.*; Saltash *v.* Goodman, *sup.* 451. See as to the Forest of Dean, Chap. XX. of the 3rd edition of this book.

[5] Constable *v.* Nicholson, 14 C. B., N. S. 230, 234, overruling the suggestion to the contrary in Padwick *v.* Knight, 7 Exch. 861.

[6] Warrick *v.* Queen's Coll., Oxford, 6 Ch. 721, 730, 731.

[7] Maxwell *v.* Martin, 6 Bing. 522.

support of a prescriptive right of digging stones on the lord's waste.[1]

A commoner entitled to dig and take clay has no right to take that which another has dug, although he be no commoner, for a commoner is only entitled to what he himself digs.[2] Commoner only entitled to what he digs.

To the rule, that a right of profit *à prendre* may be claimed by prescription, an exception exists in the case of a copyholder. Such a person cannot claim by prescription a right of profit *à prendre* in the waste land of a manor.[3] The exception is, however, confined to the waste land of the particular manor of which the copyholder holds. The copyholders of one manor may claim a right of profit *à prendre* in the wastes of another manor by prescribing in the name of their lord.[4] Exception in case of copyholder and waste.

(γ) *Lost Grant—Prescription Act.*

If a right of profit *à prendre in alieno solo* cannot be sustained on the ground either of custom or of prescription, it cannot be sustained on the ground of a lost grant. For if a grant of an unreasonable claim before the time of legal memory cannot be presumed, *à fortiori* such a grant cannot be presumed since.[5] Lost grant.

And if a right of profit *à prendre in alieno solo* cannot be sustained on the ground of custom or prescription, it cannot be sustained under the Prescription Act by an user, however long ;[6] that Act merely giving validity to claims "which may be lawfully made at the common law by custom, prescription, or grant."[7] Prescription Act.

[1] Morewood *v.* Wood, 14 East, 328, n. See Heath *v.* Deane, 1905, 2 Ch. at 91.

[2] Stile *v.* Butts, Cro. Eliz. 434.

[3] See Gateward's Case, 6 Rep. 60 b. ; Rogers *v.* Brenton, 10 Q. B. 60 ; Portland *v.* Hill, 2 Eq. 765.

[4] See Rogers *v.* Brenton, 10 Q. B. 61.

[5] See A.-G. *v.* Mathias, 4 K. & J. 579.

[6] See Clayton *v.* Corby, 5 Q. B. 415 ; A.-G. *v.* Mathias, *sup.*

[7] 2 & 3 Will. 4, c. 71, s. 1.—"No claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit or benefit to be taken, &c., . . . shall where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated," &c.

b.—WORKINGS—OTHER CUSTOMARY AND PRESCRIPTIVE WORKINGS.[1]

(*a*) *Custom.*

Copyholder may, by custom, work new mines or quarries in copyhold.

A special custom [2] may be shown to exist in a manor authorising a copyholder of inheritance, without licence from his lord, to open and work new mines or quarries within his tenement ; [3] or to dig and take away sand therefrom for the purpose of sale ; [4] or to dig and get clay therefrom for the purpose of making bricks for sale off the manor.[5] *A fortiori* where the custom alleged is limited ; as, for example, a custom to open and work new mines, not thereby interfering with the lord's sales.[6] And similar customs may be shown to exist in the case of lands held by copy of court roll, not at the will of the lord, but according to the custom of the manor.[7]

Immaterial that right exercisable without limit.

And such a custom may be good, although the right founded thereon be exercisable without stint or limit.[8] For it is a right exercisable on one's own tenement, and not a right of profit *à prendre in alieno solo*.[9] And it exclusively affects the tenant insisting on it and the lord of the manor. It is not, as in the case of a custom to dig coal or clay without stint out of the waste of a manor,[10] a custom affecting the other copyholders of the manor. It is not, therefore, open to the objection of unreasonableness. It is a custom which might well be supposed to have its origin in a grant.[11]

Right not affected by Prescription Act.

The 1st section of the Prescription Act, providing that

[1] The law as to the customary rights of copyholders in respect of wastes has been already considered : see *ante*, pp. 120, 121.

[2] A copyholder is not entitled to do so *primâ facie :* see *ante*, p. 106.

[3] See Winchester *v.* Knight, 1 P. Wms. 406 ; Bourne *v.* Taylor, 10 East, 189 ; Rowe *v.* Brenton, 8 B. & C. 737, 3 M. & Ry. 133 ; Parrott *v.* Palmer, 3 M. & K. 632 ; Hoyle *v.* Coupe, 9 M. & W. 450 ; Salisbury *v.* Gladstone, 6 H. & N. 123, 129, 130, 9 H. L. C. 692 ; Aspden *v.* Seddon, 1 Ex. D. 510.

[4] Hanmer *v.* Chance, 4 De G. J. & S. 626.

[5] Salisbury *v.* Gladstone, *sup.* ; Lingwood *v.* Gyde, L. R. 2 C. P. 73, 77.

[6] Sitwell *v.* Worrall, 79 L. T. 86.

[7] Portland *v.* Hill, 2 Eq. 765.

[8] See Salisbury *v.* Gladstone, 6 H. & N. 123, 9 H. L. C. 692 : see also Hanmer *v.* Chance, 4 De G. J. & S. 626.

[9] Salisbury *v.* Gladstone, 6 H. & N. 129, *per* Wightman, J. ; 9 H. J. C. 708.

[10] Which would be bad : see *ante*, p. 121.

[11] See Salisbury *v.* Gladstone, 6 H. & N. 129 ; 9 H. L. C. 702. See the observations of Lord Cranworth in Salisbury *v.* Gladstone, 9 H. L. C. 701 ; and of Lord Hatherley in Warrick *v.* Queen's Coll., Oxford, 6 Ch. 722.

claims by custom shall not, after thirty years' enjoyment, be defeated by merely showing their actual commencement, does not affect a claim by a copyholder to dig minerals out of his copyhold tenement; the section applying exclusively to cases where a person claims a profit *à prendre in alieno solo*.[1] And the 6th section, providing that no presumption shall be made in favour of any claim upon proof of the enjoyment of the right claimed for any period less than that prescribed, merely means that no such presumption shall be made from the bare fact of enjoyment for less than the prescribed period; and does not take away from the fact of such enjoyment its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant.[2] Accordingly where copyholders claimed a customary right to dig and carry away vitreous sand from their tenements, and the evidence was such that an inference of the existence of the custom might be readily drawn therefrom, it was held that it was not necessary to prove that the right had been enjoyed for thirty years.[3]

Evidence of custom.

In every case, however, the onus of establishing the custom relied on lies upon the tenant;[4] and it is often a question of difficulty to determine whether the evidence offered in support of an alleged custom is sufficient. The law has laid down no rule as to the extent of the evidence which is required to establish a custom, or from which the inference of the fact of a custom may be drawn. It is the province of a jury to draw these conclusions of fact.[5] In cases otherwise doubtful the effect to be attributed to acts of ownership is of course an important factor.[6] In a suit by the lord of a manor to restrain certain copyholders from digging and taking away white vitreous sand from their tenements, evidence of a custom to dig vitreous sand for twenty-seven years, and of a custom to dig sand generally for a much longer period, was adduced. The acts of the copyholders had been open and notorious, and the lord had never attempted to exercise any right of forfeiture.

[1] See Hanmer *v.* Chance, 4 De G. J. & S. 626, 631.

[2] *Ib.*

[3] *Ib.* This decision reversed S. C. 11 L. T., N. S. 667. S. 1 of the Act is cited, *ante*, p. 125, n. [7].

[4] Portland *v.* Hill, 2 Eq. 765.

[5] Hanmer *v.* Chance, 4 De G. J. & S. 626, 635.

[6] As to acts of ownership, see *ante*, pp. 77 *et seq.*

It was held, that there was sufficient evidence of a custom to dig vitreous sand to justify the copyholders; although the manor was one of large extent, and no evidence was adduced that the custom extended over the whole of it.[1]

Admissibility of evidence as to adjoining manor.

An alleged right in a copyholder, according to the custom of a manor, to dig and carry away the coals therein is not proved by producing evidence of a like custom in an adjoining manor, although in the same parish and leet.[2] And such right will not be proved, although there be evidence showing, that the latter manor was a subinfeudation of the former, unless it be clearly shown that the separation took place after the time of legal memory: for otherwise the two manors might have had different immemorial customs.[3] But where no question arises with respect to the right to minerals as between a lord and the tenant, but the only question is with respect to the rights of copyhold miners as between each other, a different rule prevails; the proposed evidence relating, not to the customs of the manor, but to the nature of the tenure of the tenants.[4] Where, therefore, in each of several manors belonging to the same lord and part of the same district, it appeared that there was a class of tenants who answered the same description, and to whom their tenements had been granted by similar words, evidence of what rights had been enjoyed by those tenants *inter se* in one manor was received to show what were their rights in another.[5] And in the mining districts of Cornwall and Derbyshire, where the local customs prevail,[6] evidence of what has taken place in one manor may, it seems, be admitted for the purpose of explaining or showing the custom in another, even where the question is with respect to the right to minerals as between a lord and the tenant.[7]

Admissibility of evidence as to other kind of waste or other mineral.

Evidence that a copyholder may do one sort of waste, such as cutting timber, is no evidence that he may do another sort of waste, such as digging mines.[8] But a custom empowering

[1] Hanmer *v.* Chance, 4 De G. J. & S. 630, 635: cf. Portland *v.* Hill, 2 Eq. 765.

[2] Anglesey *v.* Hatherton, 10 M. & W. 218.

[3] *Ib.*: cf. Buccleuch *v.* Wakefield, L. R. 4 H. L. 407.

[4] See Anglesey *v.* Hatherton, 10 M. & W. 237, 238.

[5] Rowe *v.* Brenton, 8 B. & C. 737; 3 M. & R. 133.

[6] See Chaps. XIX., XXI. of the 3rd edition of this book.

[7] Ely *v.* Warren, 2 Atk. 189; Anglesey *v.* Hatherton, 10 M. & W. 237.

[8] Winchester *v.* Knight, 1 P. Wms. 406; Parrott *v.* Palmer, 3 M. & K. 637.

copyholders to dispose of one sort of mineral may, in some cases, be evidence of their right to dispose of a different sort of mineral within the same manor.[1]

Anglesey *v.* Hatherton.

A deed, more than two hundred years old, made between the lord of a manor of the one part and a number of the copyholders of the other part, which stated in detail various alleged customs, but made no mention of any custom for the copyholders to take minerals, and which was confirmed by a decree in Chancery, was held admissible in evidence against a copyholder deriving title under one of the parties to it to negative the existence of a custom of the manor for the copyholders to take the minerals under their respective copyholds.[2] And it would probably have been evidence for the same purpose, even against a copyholder not deriving title under any of the parties to it.[3]

Portland *v.* Hill.

And the existence of a customary compiled within the period of legal memory is conclusive evidence against the existence of a custom not mentioned therein. Thus, where such a customary recognised a right in the tenants to dig coal, "*propriis usis*;" and it appeared from subsequent documents, that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste; but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures; and there was evidence of the tenants having during a long period dug coal on the customary inclosures for sale; it was held, that the custom was restricted to digging in the waste for coal for the tenant's own consumption, and that the tenants had no right of digging coal under their customary inclosures.[4]

Lord may, by custom, work new mines in copyhold.

A special custom may be shown to exist in a manor, authorising the lord to enter upon copyhold lands and work new mines thereunder.[5]

[1] Winchester *v.* Knight, *sup.*: but see Rowe *v.* Brenton, Conc. 329, 3 M. & Ry. 363, 364: see Parrott *v.* Palmer, *sup*; see also Hanmer *v.* Chance, 11 L. T., N. S. at 669; and S. C. on appeal, 4 De G. J. & S. 626.

[2] Anglesey *v.* Hatherton, 10 M. & W. 218.

[3] *Ib.*

[4] Portland *v.* Hill, 2 Eq. 765.

[5] Bourne *v.* Taylor, 10 East, 189; Hilton *v.* Granville, 1 Cr. & Ph. 293, 294; Aspden *v.* Seddon, 1 Exch. D. 510. See Eardley *v.* Granville, 3 Ch. D. 832; and cf. Whitechurch *v.* Holworthy, 4 M. & S. 340. Such a custom apparently exists throughout the county of Durham. The lord has no such right independently of custom: see *ante*, p. 108.

Extent to which lord can by custom work in waste.

Whether a custom justifying the lord of a manor in removing, or authorising another to remove, the soil of the waste, without leaving sufficient common for his commoners, can under any circumstances be considered valid, is open to doubt.[1]

Bateson *v.* Green, &c.

In *Bateson* v. *Green*,[2] a custom, by which a lord was entitled to dig clay pits in a common, or empower other persons to do so, without leaving herbage for the commoners, was held good: and *Folkard* v. *Hemmett*,[3] and perhaps also *Clarkson* v. *Woodhouse*,[4] are authorities to the same effect. And in *Place* v. *Jackson*,[5] it was held, that the lord of a manor was justified by custom in taking stones and gravel out of some commonable hills within the manor without stint.

Badger *v.* Ford, &c.

In *Badger* v. *Ford*,[6] on the other hand, it was said, that a custom, which presumed the reservation of a power by the lord at the time of the original grant of the right of common, the effect of which would be to enable him to annihilate the right of common altogether, was invalid: and *Hilton* v. *Granville* [7] contains observations of a similar kind. In *Wilson* v. *Willes*,[8] it was decided, that one copyholder of a manor could not assert a customary right, derivable from his lord, to take turf in an unlimited quantity from the common of the manor, to the prejudice of the rights of the other copyholders. And in *Arlett* v. *Ellis*,[9] it was said, after an elaborate criticism of *Bateson* v. *Green*, *Clarkson* v. *Woodhouse*, and *Folkard* v. *Hemmett*, that a custom in a manor, authorising a lord to make without limit, grants of a waste, in which copyholders had a right of common, would be bad.[10] It will be observed that, in all probability, no assistance can, in the consideration of this question, be derived from considering the law relative to the claim by custom of a copyholder to dig clay without limit out of his copyhold tenement.[11] "It may be that the lord, being

[1] The lord of a manor may, independently of custom, open mines or quarries in the manorial wastes, provided that he do not thereby prejudice the rights of the commoners: see *ante*, pp. 109, 110.

[2] 5 T. R. 411.

[3] *Ib.* 417, n. (a).

[4] 3 Doug. 189, 5 T. R. 412, n. (a). For a statement of the custom in this case, see *post*, p. 174.

[5] 4 Dowl. & Ry. 318.

[6] 3 B. & Al. 153, 155.

[7] 5 Q. B. 701: see pp. 729, 730.

[8] 7 East, 128.

[9] 7 B. & C. 346.

[10] *Per* Bayley, Holroyd, and Littledale, JJ.: see also Hall *v.* Byron, 4 Ch. D. 667, 678, 679.

[11] Such a claim may be supported: see *ante*, p. 126.

the grantor, cannot establish as a reservation out of his grant, that which, in the absence of production of the grant itself, is plainly unreasonable." [1]

Remarks on the cases.

Bateson v. *Green* may perhaps be reconciled with sound principles by treating the custom there set up as one which was only exercisable at certain fixed periods of the year. The custom set up in *Clarkson* v. *Woodhouse* may possibly be considered good, either as really being for the benefit of the commoners ; [2] or as being a custom, which was confined to a particular portion of the waste land in question. And that set up in *Folkard* v. *Hemmett* may possibly be considered good, on the ground of its having been sanctioned by the homage of the manor.[3] Unless, however, these are sound distinctions, these decisions, and also the decision in *Place* v. *Jackson*, can hardly, it is conceived, be considered good law.[4]

Possible right of lord, if bound to compensate.

It does not follow, that a custom, justifying the lord of a manor in removing the soil of the waste, without leaving sufficient common, would be bad, if it were part of the custom, that the lord should make compensation for all damage.[5]

Wanton working.

In any event, whether a custom by a lord to dig without stint be valid or not, the digging must be *bonâ fide*. The lord may be restrained if he digs wantonly.[6]

Concurrent customs.

There may, in respect of mines, be two concurrent customs in a manor, one in favour of the lord, and the other in favour of the tenants.[7]

(β) *Prescription.*

Lord may by prescription work in copyhold.

The lord of a manor may be entitled by prescription to enter upon the copyhold tenements, and dig for and get the minerals ; making compensation to the copyholders for all damage which he causes.[8]

[1] Hall *v.* Byron, 4 Ch. D. 769, *per* Hall, V.-C.

[2] See a statement of the custom, *post*, p. 174.

[3] See the observations on these cases in Arlett *v.* Ellis, 7 B. & C. 365—368, *per* Bayley, J.

[4] See also Wakefield *v.* Buccleuch, 4 Eq. 639—643, *per* Malins, V.-C. It should, however, be observed, that Bateson *v.* Green was cited by Lord Chelmsford, with apparent approval, in Salisbury *v.* Gladstone, 9 H. L. C. 709. See also Hilton *v.* Granville, 1 Cr. & Ph. 293, 294, *per* Lord Cottenham.

[5] See and consider Buccleuch *v.* Wakefield, L. R. 4 H. L. 396 : but see pp. 406, 407.

[6] Place *v.* Jackson, 4 D. & Ry. 318.

[7] Curtis *v.* Daniel, 10 East, 273.

[8] See Paddock *v.* Forester, 3 M. & G. 903.

c.—WORKINGS—MATERIALS FOR ROADS, &c.[1]

Highway Acts—power to take materials.

The Highways (Turnpike) Act, 3 Geo. 4, c. 126, empowers surveyors to the trustees or commissioners of any turnpike road to search for, dig, and carry away any materials for making or repairing turnpike roads, out of specified places, on specified conditions.[2] Similarly the General Highways Act, 5 & 6 Will. 4, c. 50, empowers surveyors of parishes to dig and carry away materials, out of specified places, on specified conditions.[3]

Rail. Cl. Cons. Act—power to take materials.

Section 32 of the Rail. Cl. Cons. Act, 1845,[4] empowers a railway company to take materials out of specified places; and in the exercise of these powers to dig and take "any clay, stone, gravel, sand, or other things that may be found therein useful or proper for constructing the railway"; provided that no "stone or slate quarry, brick field, or other like place which at the time of the passing of the special Act shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same shall be taken or used by the company." These powers are, however, subject to the conditions specified in sections 33 to 37, 40, 41, and 42; under the latter of which the owner may compel the company to purchase the land in question. And under sections 39, 43, when the company are not required to purchase, they must make compensation, which includes "the full value of all clay, stone, gravel, sand, and other things taken from such lands." Finally, section 77 provides, that "a company shall not be entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased."

Effect of these provisions.

The provisions of sections 32 to 34 apparently apply to the case of a company, who are already in possession of a surface, and who are desirous of taking the underlying earth or soil.[5] And they apply to lands, although not in the deposited plans, and although the compulsory purchasing powers may have

[1] These cannot usually be taken under custom: see *ante*, p. 120.

[2] Ss. 97, 98, 99, 101: see also 7 & 8 Geo. 4, c. 24, s. 15.

[3] Ss. 47, 51—55, 57.

[4] 8 & 9 Vict. c. 20.

[5] See Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 34, 43.

expired ; and a purchase under section 42 vests in the company, as part of the property purchased, clay, stone, gravel, sand, and other things of that kind, although not expressly purchased ; and the expression "any land purchased" in section 77 includes a purchase under section 42.[1] The words "necessary to be dug or carried away or used in the construction of the works" may entitle a company to use clay dug out of a cutting on the land of one person in order to construct an embankment on the land of another.[2] But they do not entitle a company, who carry a railway upon an embankment over the land of one person, to excavate merchantable clay from that land and use it to puddle bridges which they are building on other land.[3]

Wat. Cl. Act.

Section 12 of the Wat. Cl. Act [4] empowers the undertakers to remove and use all "earth, stone, mines, minerals, trees, and other things dug or gotten out of" lands entered upon under the powers of their special Act.

d.—USER.

Lord of manor may have right of user, by custom, or prescription.

The lord of a manor may be entitled by custom to enter upon the surface of the copyholds or the customary freeholds, and to dig pits therein for the purpose of working the mines ; [5] or to deposit thereon earth or rubbish ; [6] or to use a portion of the subsoil for the carriage of the minerals ; [7] either unconditionally, or upon the terms of making compensation for all damage.[8] And the lord of a manor may be entitled, either by custom or by prescription, to dig pits upon the surface of the waste lands of the manor for the purpose of working the

[1] Glasgow *v.* Farie, 13 A. C. 694, 695, *per* Lord Macnaghten.

[2] See Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 33, 34, *per* Fry, J. See, however, Jamieson *v.* North Brit. R. Co., 6 Scot. L. R. 188 ; a decision under the Scotch Act, 8 & 9 Vict. c. 33.

[3] Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 33, 42, *per* Fry, J. The House of Lords reversed the Court of Appeal, and restored the decision of Fry, J. : see 9 A. C. 480 : see further as to the words "necessary, &c.," *post*, p. 225.

[4] 10 & 11 Vict. c. 17.

[5] Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 59. It does not, however, appear, whether the custom was one exercisable by the lord of the manor as such. See also Eardley *v.* Granville, 3 Ch. D. 832.

[6] See Ballacorkish, &c., Co. *v.* Harrison, *sup.* 59, 60.

[7] See Eardley *v.* Granville, *sup.* 833.

[8] See Ballacorkish, &c., Co. *v.* Harrison, *sup.* ; Eardley *v.* Granville, *sup.* 826, 833 : see also Great Laxey Mining Co. *v.* Clague, 4 A. C. 115, 116 ; A.-G. *v.* Mylchreest, *ib.* 309.

underlying mines or quarries,[1] with the incidental right to deposit earth or rubbish upon such surface.[2]

But custom as to copyholds subject to restriction.

However, a customary user of copyholds, in order to be good, must not be without limitation. If, therefore, it involves a right which might be exercised so as to render a copyhold tenement useless for the tenant, it will be bad. Thus, in an action brought by the customary tenant of a manor, the following custom was alleged. It was said, that whenever the lord of the manor, or his tenants of collieries within the manor, sank pits in the freeholds of the manor for the purpose of working the collieries, he and they had been accustomed to throw the earth, stones, coals, &c., coming from such pits together in heaps on the land, being customary tenement of the manor, "near to such pits there to remain and continue," and to place wood there for the necessary use of the pits, and to take away thence part of the coals so placed there, and to burn other part of such coals "at his and their free will and pleasure." It was held, that this custom was bad, as being uncertain and unreasonable.[3]

[1] Rogers *v.* Taylor, 1 H. & N. 706.
[2] *Ib.*
[3] Broadbent *v.* Wilks, Willes, 360; Wilkes *v.* Broadbent, 1 Wils. 63; 2 Str. 1224.

CHAPTER VI.

WORKING AND USER AS BETWEEN CO-OWNERS AND PARTNERS.

a.—CO-OWNERSHIP WITHOUT PARTNERSHIP EITHER IN WORKING OR LAND.

(*a*) *Possession and Working—Generally.*

Every co-owner entitled to work.

Any joint tenant, tenant in common, or coparcener, of a mine or quarry, is entitled to enter upon and work it.[1] "No authority has been referred to, and I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share. . . . How is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal?"[2]

And incidentally to remove whole.

It has been doubted whether the above statements are not too broad;[3] and in the actual case, where they were made, the co-owner who worked left *in situ* a part which was more than equivalent to the interest of the other co-owner in the entirety.[4] It is submitted, however, that the working co-owner is incidentally entitled to remove, not merely a part, but the whole. In the absence of a partition, the mere leaving of a part cannot deprive the working co-owner of his interest in such part; or deprive the other co-owner of his interest in the part which is removed. And, even where there is no ouster or destruction,[5]

[1] See and consider Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Job *v.* Potton, 20 Eq. 84, 93, 94, 97. Perens *v.* Johnson, 3 Sm. & G. 427, does not contain anything to the contrary.

[2] Job *v.* Potton, 20 Eq. 84, 93, *per* Bacon, V.-C. Cf. Wilkinson *v.* Haygarth, 12 Q. B. 837. Ackroyd *v.* Briggs, 14 W. R. 25, is no authority to the contrary of Job *v.* Potton, its facts being apparently entirely misstated: see the report in 15 L. T., N. S. 521.

[3] See Glyn *v.* Howell, 1909, 1 Ch. at pp. 676, 677, *per* Eve, J.

[4] The facts in Job *v.* Potton are stated, *post*, p. 137.

[5] See *post*, p. 136.

the other co-owner is not damnified; as he is entitled to an account.[1] In the case in question this right was carefully respected.[2] Apart from these considerations, it is difficult, if not impossible, to secure that the part which is left shall be equal in quality to that which is removed. And, in any event, it may be added, that there is no more wasteful mode of working than leaving a part *in situ*; and, unless it is necessary so to work on some such ground as that of leaving support, the other co-owner might reasonably object to it for that reason alone.

Remedies for interference with right—generally.

In case of actual ouster, the injured party may recover mesne profits.[3] And he may maintain trover or trespass, either where there is actual ouster, or where the common property is destroyed by the act of the co-owner.[4] Unless, however, in case of actual ouster, or unless the common property is destroyed, none of these remedies can, in general, be obtained. For, if it is the right of the person seeking the remedy to enter upon and work the mine or quarry, it is equally the right of the person against whom he seeks it to do so.

Receiver and manager.

Where two or more persons are co-owners of a mine or quarry, without more, and disputes take place between them, a receiver and manager will not, as a general rule, be appointed at the instance of one of them.[5] However, if the applicant seeks by his action a partition or sale, he will be entitled to the appointment of a receiver and manager, even on interlocutory application.[6]

Destructive waste.

No co-owner is entitled to work in an improper or unskilful manner amounting to destructive waste.[7] If he does, he may be restrained by injunction.[8]

[1] See *post*, p. 137.

[2] See the facts in Job *v.* Potton, *post*, p. 137.

[3] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 51.

[4] *Re* Smith, 10 Ch. 85.

[5] See Roberts *v.* Eberhardt, Kay, 148, 158, 159. The contrary was formerly laid down: see Jefferys *v.* Smith, 1 J. & W. 203; Wynget *v.* Heathcote, cited in Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 187.

[6] Roberts *v.* Eberhardt, *sup.* Of course, if a receiver only is appointed, the working of the mine is stopped: if it is desired to continue the working, a manager, as well as a receiver, is necessary: *Ex parte* Cambrian Co., 14 Ch. D. 653.

[7] See Wilkinson *v.* Haygarth, 12 Q. B. 837; Job *v.* Potton, 20 Eq. 84.

[8] *Ib.*

(β) *Account—Lien.*

Every co-owner entitled to account.

And no co-owner is entitled to appropriate more than his share of the produce.[1] If he does, an action for an account will lie against him.[2] In accounting he is bound to give credit for profits earned; but he is entitled to take credit for the expenses of getting and severing and bringing to bank.[3] Where, therefore, two out of three tenants in common of a mine demised their shares; and the lessee worked less than two-thirds of the whole, and accounted to his lessors for the agreed rent; it was held, that, in accounting to the third tenant in common, he was bound to account according to the market value at the pit's mouth, less the expenses of getting and severing and bringing to bank.[4]

Not in general to lien.

On the other hand, if one co-owner chooses, without any agreement with the others, to enter on and work the mine or quarry, he has not, in respect of his expenses, a lien on the share of the others.[5] But it may be otherwise, if the working takes place with the acquiescence of the others, and the expenses have been incurred in procuring necessaries.[6]

b.—CO-OWNERSHIP OF LAND, BUT PARTNERSHIP IN WORKING.

(α) *Possession and Working—Generally.*

Every partner entitled to work.

Where two or more persons are partners in the working of a mine or quarry without being partners in the mine or quarry itself, any partner is entitled to enter upon and work it in a practicable and feasible way.[7] He will not, however, against the will of the others, be allowed to send a separate set of miners down a shaft to work his own share only. For if

[1] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Job *v.* Potton, *sup.* 93.

[2] *Ib.*; *Re* Smith, 10 Ch. 85. Prior to the Jud. Acts such account might have been obtained either in equity by bill, or at law by action under the Act 4 & 5 Anne, c. 3, s. 27: see Denys *v.* Shuckburgh, *sup.*

[3] See Job *v.* Potton, 20 Eq. 84, 97.

[4] See *ib.* 97, 98. See the minutes of the order at p. 99. See Glyn *v.* Howell, 1909, 1 Ch. at pp. 676, 677, and see the observations on both cases, *ante*, p. 135.

[5] See and consider Fereday *v.* Wightwick, 1 R. & My. 45, 49, 50.

[6] See Scott *v.* Nesbitt, 14 Ves. 445; Sayers *v.* Whitfield, 1 Knapp, P. C. 149.

[7] See and consider Jefferys *v.* Smith, 1 J. & W. 302; Roberts *v.* Eberhardt, Kay, 148, 159, 161—163.

every partner did this, it would be practically impossible to continue the working.[1] There would, in fact, in such a case, be a direct interference with the others.[2]

Receiver and manager.

Any such partner is entitled in an action seeking for dissolution and accounts, if he can show exclusion or disagreement between the partners as to the proper method of working, to obtain on interlocutory application an order for a receiver and manager of the whole mine or quarry.[3] Where, however, dissolution and accounts are not sought for, an order on interlocutory application for a receiver and manager will not in general be obtained.[4] Nor even in an action seeking dissolution and accounts will such an order be obtained, unless the applicant can show exclusion or interference ;[5] or, at all events, inability to agree upon a plan for the working ;[6] and it is not sufficient to show mere negative want of co-operation.[7]

(β) *Account—Contribution and Lien.*

Every partner entitled to account.

Of course, no such partner is entitled to appropriate more than his share of the produce.[8] If he does, the other partners may obtain an account against him. And they may do so without seeking a dissolution.[9] For the necessity of seeking a dissolution, in order to take an account, applies only to mercantile concerns strictly so called. And mining concerns, although mercantile for some, are not so for all, purposes.[10] The extent to which, in such a case, appropriation will be

[1] See Jefferys *v.* Smith, *sup.* ; Tatam *v.* Williams, 3 Ha. 355 ; Roberts *v.* Eberhardt, *sup.* 156, 157.

[2] See Roberts *v.* Eberhardt, *sup.* 162, 163.

[3] Crawshay *v.* Maule, 1 Swanst. 495, 507, 527, 529 ; Jefferys *v.* Smith, *sup.* 302 ; Roberts *v.* Eberhardt, *sup.* 148, 155 ; County of Gloucester Bank *v.* Rudry, &c., Co., 1895, 1 Ch. 637, 638 : cf. Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182.

[4] Roberts *v.* Eberhardt, *sup.* 155, 158—160.

[5] *Ib.* 161, 162. As to what will constitute interference, see *ib.*

[6] See and consider Lees *v.* Jones, 3 Jur., N. S. 954.

[7] Roberts *v.* Eberhardt, *sup.* 161, 163. For the form of an order which in a proper case will be made, see Clegg *v.* Fishwick, Set. 764 ; Clarke *v.* Smith, *ib.* ; Jefferys *v.* Smith, *ib.* (where the order ran "himself or such other person as he should think fit being a practical miner") ; Rodewald *v.* Wayne's Merthyr, &c., Works, *ib.* 765, 766 (where special provision was made as to debts).

[8] See Bentley *v.* Bates, *sup.* 182 ; Roberts *v.* Eberhardt, *sup.* 158, 159 ; Clegg *v.* Clegg, 3 Giff. 322.

[9] Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182 : see the observations on this case in Roberts *v.* Eberhardt, Kay, 158, 159.

[10] See Bentley *v.* Bates, *sup.* 190.

disallowed is illustrated in *Clegg* v. *Clegg*.[1] There A., B., and C., were tenants in common of mines; A. being entitled to one moiety, and B. and C. to the other. Part of the surface (called Bent Grange) belonged in severalty to B. and C. Under the terms of an agreement with them, a lessee of the mines sank a shaft through Bent Grange; and he subsequently used it for the carriage of foreign coal. It was held, that the shaft, although made upon ground which was the separate property of B. and C., was in effect made at the common expense of all the lessors; and that A. was, accordingly, entitled to a moiety of the profit made by the carriage of the foreign coal.

And to contribution and lien.

If any such partner incurs proper and necessary expenses in the working, or incurs expenses to preserve the mine from a calamity, such as drowning, he is entitled to have them deducted out of the joint profits before any division takes place.[2] And if, in the course of the working, one of such partners becomes indebted to another, the creditor has a lien on the debtor's share in the concern.[3] And such lien will be enforced against a mortgagee or trustee in bankruptcy.[4]

(γ) *Pledging Credit.*

Co-owners in general partners as regards third parties.

Whatever relation may be occupied by them *inter se*, it seems hardly possible for two or more co-owners of a mine or quarry, who work it in partnership, to avoid holding themselves out to the world as, and subjecting themselves to all the consequences of being, partners in the land.[5]

c.—ORDINARY PARTNERSHIP.[6]

(*a*) *Possession and Working—Generally.*

Every partner entitled to work.

Any ordinary partner in the working of a mine or quarry, and also in the land itself, is entitled to enter upon the mine

[1] 3 Giff. 322.

[2] Roberts *v.* Eberhardt, Kay, 148, 161, 162.

[3] Fereday *v.* Wightwick, 1 R. & My. 45, Taml. 250.

[4] Fereday *v.* Wightwick, *sup.*

[5] See Crawshay *v.* Maule, 1 Swanst. 523.

[6] Of course it does not follow, that, where two or more persons take a lease of a mine for a specified period for partnership purposes, the duration of the partnership is co-extensive with that period: see Jefferys *v.* Smith, 1 J. & W. 301; Crawshay *v.* Maule, 1 Swanst. 508, 516, 521, 522, 526. Where there is a conflict of evidence, the onus of establishing that there is more than a partnership at will lies upon him who asserts that fact: Burdon *v.* Barkus, 3 Giff. 412, 4 De G. F. & J. 42.

or quarry and work it, and he cannot be prevented from so doing by the others. But he must work it in a practicable and feasible way, and not in a wasteful way.[1]

Receiver and manager.

Any such partner is, in general, entitled in an action seeking for dissolution and accounts, if he can show exclusion, or waste, or disagreement between the partners as to the proper method of working, to obtain, on interlocutory application, an order for a receiver and manager of the mine or quarry.[2] And the mortgagee of a partner has a similar right against the other partners.[3] Even before the Jud. Acts this was so; mining operations having always been regarded as a species of trade.[4] Where, however, dissolution and accounts are not sought, such an order will not be obtained;[5] except under very special circumstances.[6] Nor even, in an action seeking dissolution and accounts, will such an order be obtained unless the applicant can show exclusion or interference,[7] or clear mismanagement of a particular and specified nature;[8] or, at all events, inability to agree upon a plan for the working;[9] and it is not sufficient to show mere negative want of co-operation.[10] *A fortiori*, such an order will not be obtained, where dissolution is not sought for, and the application is made on behalf of a lunatic. For it would be unjust to compel any person to carry on a partnership with the committee of a lunatic, and thereby subject him to the necessity of having every question as to outlay in the management determined by the Court.[11]

Same person mortgagee and partner.

Whatever may be the rights of a person who is the

[1] See and consider Norway *v.* Rowe, 19 Ves. 157, 159; Crawshay *v.* Maule, 1 Swanst. 495, 507, 526, 529; Jefferys *v.* Smith, 1 J. & W. 302; Rowe *v.* Wood, 2 *ib.* 556, 558; Roberts *v.* Eberhardt, Kay, 148, 161, 162.

[2] See *ib.*: cf. Clegg *v.* Fishwick, 1 M. & G. 294. For the form of the order, see *ante*, p. 138, n. [7].

[3] See Bentley *v.* Bates, 4 Y. & C. Eq. Exch. 182, 187.

[4] See Jefferys *v.* Smith, 1 J. & W. 302: see also *ante*, p. 95, n. [5], and other cases there cited.

[5] Roberts *v.* Eberhardt, Kay, 148, 158—160; Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302.

[6] For an instance of which, see Sheppard *v.* Oxenford, 1 K. & J. 491.

[7] Roberts *v.* Eberhardt, *sup.* 161, 162. As to what will constitute interference, see *ib.*

[8] Rowe *v.* Wood, 2 J. & W. 556. Dissolution was not prayed for, but the refusal of the application was not put upon that ground.

[9] Jefferys *v.* Smith, 1 J. & W. 298, 302; Lees *v.* Jones, 3 Jur., N. S. 954.

[10] Roberts *v.* Eberhardt, *sup.* 148, 161, 163.

[11] Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302, 310.

mortgagee of another person,[1] if afterwards he also becomes his partner, he is bound to have regard not merely to his position as mortgagee, but to his position as partner.[2] Having regard to the latter position, he cannot wholly exclude the mortgagor from interference; and he must keep regular accounts of his receipts and payments and other transactions in relation to the mine, and allow the mortgagor constant access for the purpose of inspecting them.[3] But if he complies with his obligations in these respects, he will not have a receiver and manager appointed against him.[4]

Delay.

If one of two or more partners in a mining concern wishes to obtain an order for the appointment of a receiver and manager, he must, in consequence of the fluctuating value of mining property, be prompt to take the proper steps; and if he neglects to do so until the mine has proved profitable, he will be deprived of his right.[5]

(β) *Account—Trusts—Contribution.*

Every partner entitled to account.

Of course, no partner is entitled to appropriate more than his share of the produce.[6] If he does, the other partners may obtain an account against him;[7] and without seeking a dissolution.[8] A mortgagee in possession being bound to account on the footing of wilful default, and a partner not being so bound, it is doubtful upon what principle a person ought to account who unites in himself the two characters.[9]

Rights of mortgagee of partner.

The mortgagee of a partner in a mine or quarry has a right to an account against the other partners.[10] He is also entitled, in default of payment, to the usual foreclosure judgment.[11] And, consequent upon the latter relief, he is entitled to have an account taken of the profits of the concern made since the

[1] See *ante*, pp. 114 *et seq.*

[2] Rowe *v.* Wood, 2 J. & W. 556, 557.

[3] *Ib.* 558, 559.

[4] *Ib.* 559.

[5] See Sheppard *v.* Oxenford, 1 K. & J. 497, 498.

[6] Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182.

[7] Clegg *v.* Edmondson, 8 De G. M. & G. 811, 814.

[8] Bentley *v.* Bates, *sup.* 182; *ante*, p. 138: see the observations on this case in Roberts *v.* Eberhardt, Kay, 158.

[9] The point was mooted, but not decided, in Rowe *v.* Wood, 2 J. & W. 556, 557.

[10] Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182: see also Redmayne *v.* Forster, 2 Eq. 467, 477. Cf. Watson *v.* Eales, 23 Beav. 294.

[11] Redmayne *v.* Forster, *sup.*: cf. Watson *v.* Eales, *sup.*

issue of the writ; to have an account taken of what the debts and liabilities of the concern consist; and to have it ascertained, as between him and the other partners, what proportion of such debts and liabilities is properly attributable to the share mortgaged to him.[1] Such share cannot, moreover, as between him and the other partners, if they knew of and assented to the mortgage, be affected by any burdens which were not thrown upon it by some contract in force at the time when the mortgage was effected.[2] The mortgagee is not, however, in having the account taken, entitled, as against the other partners, to any account of profits paid or distributed before the issue of the writ.[3] Nor is he entitled to contest the propriety of the way in which previous calls made upon the other partners in respect of their shares have been applied, or to require the other partners to account for their previous management of the concern.[4] In case the instrument under which the partners have worked contains a clause of pre-emption, the other partners are entitled, in the events of a foreclosure judgment being obtained against the mortgagor and of his being absolutely foreclosed, to have a day fixed within which they or some or one of them may redeem the mortgage.[5] And in such a case, inasmuch as each of the other partners is entitled to see that the amount, upon payment of which he is entitled to redeem the mortgage, is properly ascertained, he is a necessary party to an action by the mortgagee to realize his security.[6]

Constructive trustee.

If a mine or quarry is held upon lease by a partnership, and any partner before or upon the expiration of the lease obtains a renewal of it in his own name, he will be a trustee of it for the partnership.[7] And the fact that the partnership is at will, or that the lessor would not have renewed to the co-partners, is immaterial.[8] And the mere communication of the intention

[1] Redmayne *v.* Forster, *sup.* 477, 478.

[2] *Ib.* 477.

[3] *Ib.*

[4] *Ib.*

[5] *Ib.* 477, 478.

[6] *Ib.* 478. As to the general law, see s. 31 of Partnership Act, 1890.

[7] Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Senhouse *v.* Christian, cited 19 *ib.* 157, 159, 19 Beav. 356, n., 357, n.; Clegg *v.* Fishwick, 1 M. & G. 298; Clegg *v.* Edmondson, 8 De G. M. & G. 787; Clements *v.* Hall, 2 De G. & J. 173, 186, 189, which reversed S. C. 24 Beav. 333: see also Norway *v.* Rowe, 19 Ves. 159.

[8] Clegg *v.* Edmondson, *sup.*

to apply for the renewal is also immaterial, especially if the person obtaining it is the managing partner.[1]

Every partner entitled in general to contribution and lien.

If any partner in a mine or quarry incurs proper and necessary expenses in the working; or incurs expenses to preserve the mine from a calamity, such as drowning; he is entitled to have them deducted out of the joint profits before any division takes place.[2] He is also in general entitled, in case the working results in a loss, to call upon the other partners for a contribution.[3] And it is in general immaterial, that the loss should consist of damages given against him for a partnership act.[4] But not so, where the loss is due to his own personal misconduct or gross negligence. Thus, where a managing partner, although without knowingly trespassing, worked beyond the limits of a colliery without proper inquiry as to the limits; and continued his workings after notice that he was trespassing without consulting his partners, and when it was evident both that his right to work was extremely doubtful, and that the profits to be expected from so doing were small; it was held, that the other partners were not liable to contribute to a sum awarded as damages for the trespass.[5] If, in the course of the working, one partner becomes indebted to another, the creditor has a lien upon the debtor's share in the concern.[6] And such lien will be enforced against a mortgagee or trustee in bankruptcy.[7] The managing partner of a mine or quarry cannot be made liable for not advancing more money in the working than a prudent owner would have done.[8]

Account—positive abandonment.

If one of two or more partners in a mining concern positively abandons his interest, and the other partner or partners accept the abandonment, the abandoning partner cannot subsequently

[1] *Ib.* For the form of the declaration which will be made in such a case, see Clegg *v.* Fishwick, Set. 2168, 2169. An inquiry was directed in Clements *v.* Hall, *sup.*, of what the testator's interest consisted at his death, and whether it had determined, and if so, how; the testator having been the cestui que trust: see Set. 2201.

[2] Roberts *v.* Eberhardt, Kay, 148, 161, 162; Burdon *v.* Barkus, 4 De G. F. & J. 51.

[3] See German Mining Co., 4 De G. M. & G. 41, 42.

[4] Thomas *v.* Atherton, 10 Ch. D. 199.

[5] *Ib.* 185, 199 *et seq.*

[6] Norway *v.* Rowe, 19 Ves. 160; Fereday *v.* Wightwick, 1 R. & My. 45, Taml. 250.

[7] Fereday *v.* Wightwick, *sup.*

[8] Rowe *v.* Wood, 2 J. & W. 556.

claim an account. And it is immaterial that he had a legal, and not a mere equitable, interest.[1]

Account—mere delay—when fatal.

And if one of two or more such partners wishes to obtain an account; and if, having a mere equitable interest, to give effect to which the aid of the Court is necessary, he wishes to obtain that aid; he must, having regard to the fluctuating and hazardous character of mining operations, be prompt in asserting his claim. And if, for a considerable time, during which the mining operations have been unprosperous, he has neglected to assert his claim, he will not be permitted to come forward, and claim an account, when the operations become successful.[2] And even if his position is that of a person who has a legal interest, and whose interest it is attempted to disturb, he will not, if he has neglected to assert his rights for a considerable time, during which the operations have been unprosperous, and during which he has refused to bear a part of the expenses, be allowed to claim an account, when the concern becomes prosperous.[3] And, by analogy to the Statute of Limitations, a neglect for six years will for this purpose be considered sufficient.[4]

When not fatal.

If, however, a person who has a legal interest can show, that, throughout the interval during which he had refused to contribute, he had insisted on his rights, and that his rights had been recognised by the other partners, he will not be disentitled to relief.[5] To disentitle him he must be shown to have positively abandoned his rights. Mere laches are not a bar to a person who has a legal interest.[6] But where such a person obtains relief, he can only do so upon the terms of undertaking to bear his due proportion of the expenditure,

[1] Clarke *v.* Hart, 6 H. L. C. at p. 656; Palmer *v.* Moore, 1900, A. C. 293, 298.

[2] See Clarke *v.* Hart, 6 H. L. C. 633; Rule *v.* Jewell, 18 Ch. D. 660, 663.

[3] See Prendergast *v.* Turton, 1 Y. & C. C. C. 98, affirmed 13 L. J. Ch. 268 (where an interval of eleven years had elapsed); Rule *v.* Jewell, 18 Ch. D. 660. See also Clarke *v.* Hart, *sup.*

[4] Rule *v.* Jewell, *sup.*, *per* Kay, J.: cf. Clegg *v.* Edmondson, 8 De G. M. & G. 810.

[5] See Clarke *v.* Hart, 6 H. L. C. 633, affirming Hart *v.* Clarke, 6 De G. M. & G. 232, which reversed Hart *v.* Clarke, 19 Beav. 349. Here an interval of four years had elapsed. Cf. Rule *v.* Jewell, 18 Ch. D. 660, 664, 665.

[6] Clarke *v.* Hart, *sup.*; Garden, &c., Co. *v.* M'Lister, 1 A. C. 39, 57; Rule *v.* Jewell, *sup.*: see also Erlanger *v.* New Sombrero Co., 3 A. C. 1282, 1283.

and of allowing to the other partners interest at £5 per cent. per annum upon the excess of their expenditure beyond their proper proportion.[1]

Trust—delay—when fatal.

On similar principles the right to enforce a trust of mining property will in many cases be lost unless it is promptly asserted;[2] such property being "subject to extraordinary contingencies," and requiring for its productiveness "a large and uncertain outlay."[3] If, for instance, one of two partners in a leasehold mine, before or upon the expiration of the lease, obtains a renewal of it in his own name; and the other partner, instead of immediately enforcing the trust which thereupon arises in his favour,[4] permits the lessee to continue the working; and neither applies for accounts, nor offers to contribute to the expenses; he will after a time lose his right to relief.[5] And in such a case the mere continual assertion of a claim, unaccompanied by any act to give effect to it, will not be sufficient to keep alive a right, which would otherwise be precluded.[6] It would not have had that effect as against the Statutes of Limitations; and in the case of mining property the Court goes beyond the analogy of the Statutes.[7] And it must always in such a case be difficult for a claimant to get rid of the objection of delay by attempting to show that the mine in question had been tested and explored, and that no uncertainty whatever attached to its value. For no "degree of science, foresight, and examination affords a sure guarantee against sudden losses, disappointments, and reverses" in the working of a mine.[8] And the same rule, which applies against a beneficial owner, applies against a personal representative.[9]

When not fatal.

The objection of delay may, however, be got rid of by the claimant showing that he has applied for accounts of the

[1] Clarke *v.* Hart, *sup.*

[2] See Clarke *v.* Hart, 6 H. L. C. 633; Clegg *v.* Edmondson, 8 De G. M. & G. 787; Whalley *v.* Whalley, 2 De G. F. & J. 310, 331.

[3] Clegg *v.* Edmondson, *sup.* 787, 808, *per* Turner, L.J.: see also Clements *v.* Hall, 2 De G. & J. 186, 189.

[4] See *ante*, p. 142.

[5] See Senhouse *v.* Christian, cited 19 Ves. 157, 159; 19 Beav. 356, n., 357, n.; Norway *v.* Rowe, 19 Ves. 156, 157; Tatam *v.* Williams, 3 Ha. 356; Clegg *v.* Edmondson, *sup.* 787. In the last case the plaintiff took no step for nine years. See also Clements *v.* Hall, *sup.* 186—188.

[6] Clegg *v.* Edmondson, *sup.*

[7] *Ib.* 810: cf. Rule *v.* Jewell, 18 Ch. D. 660; *ante*, p. 144.

[8] Clegg *v.* Edmondson, 8 De G. M. & G. 814, *per* Knight Bruce, L.J.

[9] See Clements *v.* Hall, 2 De G. F. & J. 186, 188.

working, and that the application has been refused. For, in such a case, he has been kept in ignorance of the circumstances which were necessary to enable him to decide as to the propriety of insisting on his right.[1] And of course the objection can be got rid of, if the claimant has been under disability.[2] And in doubtful cases the non-communication of the intention to apply for the renewal, or the smallness of the subsequent outlay and profits, is an element in favour of the claimant.[3] The doctrine, that delay is fatal to the enforcement of a trust, does not appear to apply with the same force where the trust is express as where it is constructive.[4]

(γ) *Pledging Credit.*

Dealings on credit.

The manager of a mining partnership, whether he be a partner or not, may, *primâ facie*, as between the partners generally and the creditor, bind the partners generally by incurring debts for wages and goods and by other dealings on credit for the purpose of working the mine, if such a course appear to be necessary or usual in the management; and such creditor may sue any partner accordingly.[5] And even if, in such a case, the concern is being carried on with a smaller amount of capital than the amount agreed on at the time of its formation, the defendant will not be free from liability, if he has acquiesced in that course of management.[6] Of course, however, in every such action it must appear that the defendant is in fact a partner, or has held himself out as such.[7] And, if the goods supplied are not necessary or usual in the working, the partners are not liable for their price.[8]

Borrowing money.

It is doubtful whether the authority of the manager extends

[1] See Clements *v.* Hall, *sup.* 173, 188 (reversing S. C. 24 Beav. 333), *per* Lord Cranworth.

[2] Clegg *v.* Edmondson, *sup.* 813.

[3] Clements *v.* Hall, 2 De G. F. & J. 189, 190, *per* Turner, L.J. The latter judge laid it down, that in all cases, where the right to enforce the trust is sought to be defeated, the grounds put forward for defeating it should be watched with jealousy.

[4] See Walker *v.* Jefferys, 1 Ha. 341; Clegg *v.* Edmondson, *sup.* 808, 812: cf. *ante*, pp. 144 145. But see Whalley *v.* Whalley, 2 De G. F. & J. 310.

[5] German Mining Co., 4 De G. M. & G. 19, 40, 41. The same principle applies in the case of cost-book mines: see pp. 513 *et seq.* of the 3rd edition of this book.

[6] Steigenberger *v.* Carr, 3 Man. & G. 191, 3 Scott, N. R. 466. The same principle applies in the case of cost-book mines: see p. 514 of the 3rd edition of this book.

[7] Pott *v.* Eyton, 3 Com. B. 32: cf. Carter *v.* Whalley, 1 B. & Ad. 11.

[8] Copper Miners' Co. *v.* Fox, 16 Q. B. 229.

so as to bind the partners by borrowing money on their credit, although such money be applied for the necessary purposes of the mine. In *Burmester* v. *Norris* [1] an action to fix the partners with liability failed.[2] In *Ducarrey* v. *Gill* [3] and *Brown* v. *Kidger* [4] similar actions succeeded. It is not easy to see why the *primâ facie* position of an ordinary mining partnership or company, as regards the authority of the members to bind each other by borrowing money for the necessary purposes of the concern, should differ from that of other trading partnerships or companies.[5] At all events, if the moneys in question are not borrowed from strangers, but are advanced by some of the partners themselves at the request of the manager or managers, they will be treated as debts due from the partnership ; [6] and will, moreover, *primâ facie*, be allowed to carry interest.[7] And if the moneys in question are advanced by the managers, they may be entitled to be indemnified by the partners.[8]

Negotiable instruments.

However, *primâ facie*, the manager of a mining concern has no authority to bind the partners ; nor has any partner authority to bind the other partners ; by drawing, or making, or accepting, or indorsing bills of exchange or promissory notes.[9] In such cases the person, who draws, or makes, or accepts, or indorses a bill of exchange or a promissory note, is alone liable. And where a bill is drawn upon a mining concern and accepted by one of the partners, not in his individual capacity, but by procuration for the concern, the partner so accepting is personally liable.[10] Knowledge or acquiescence may, however, render a partner liable who would otherwise not be so.[11]

[1] 6 Exch. 796.

[2] See also German Mining Co., 4 De G. M. & G. 35.

[3] M. & M. 450, 4 C. & P. 121.

[4] 3 H. & N. 853

[5] The law as respects cost-book mines stands upon a different footing : see pp. 517, 518 of the 3rd edition of this book. See, however, the observations of Turner, L.J., in German Mining Co., 4 De G. M. & G. 39 *et seq.*

[6] *Ib.* 19 ; where the company in question was the same as in Burmester *v.* Norris, *sup.*

[7] *Ib. per* Knight Bruce, L.J., Turner, L.J., doubting.

[8] German Mining Co., *sup.*

[9] Ducarrey *v.* Gill, M. & M. 450, 4 C. & P. 121 ; Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 191 ; Thicknesse *v.* Bromilow, 2 Cr. & J. 425 ; Brown *v.* Byers, 16 M. & W. 252 : cf. Bult *v.* Morrell, 12 A. & E. 745 ; Brown *v.* Kidger, 3 H. & N. 853. The law as to cost-book companies is the same : see p. 518 of the 3rd edit. of this book.

[10] Owen *v.* Van Uster, 10 C. B. 318.

[11] Harrison *v.* Heathorn, 6 M. & G. 81 ; Thicknesse *v.* Bromilow, *sup.* Cf. Brown *v.* Byers, *sup.*

CHAPTER VII.

POWERS WITH RESPECT TO SALES, PURCHASES, MORTGAGES, ENFRANCHISEMENTS, PARTITIONS, EXCHANGES, AND INCLOSURES.

Sect. 1.—TENANT IN FEE.

Lunatic.

The committee of a lunatic may, under the authority of the Court, sell, partition, or exchange mines or quarries belonging to the lunatic.[1] And land containing such mines or quarries may be sold, partitioned, or exchanged without the mines or quarries, and without any obligation to leave support for the surface.[2] The lunatic has the same interest in the moneys received on any such sale, partition, or exchange, as he would have had in the property dealt with; and, on his death, moneys received for equality of exchange or partition are, subject to the application thereof for any purposes authorised by the Act, considered as real estate.[3]

Re Smith.

Where two persons of sound mind were tenants in common of mines with a lunatic; and the two sold a part of the mines, and granted a lease of another part in consideration of a gross sum payable by instalments within a limited time; and one of the two subsequently became a lunatic; and the other sold and granted a lease of other parts in like manner; and the sales and leases were subsequently confirmed by the Court; and the first lunatic died leaving the second lunatic her heir-at-law and sole next of kin; and the second lunatic then died; it was held (1) that the leases were in the nature of absolute sales; (2) that the confirmation of the sales and leases operated as sales under the order of the Court; and (3) that, as between the real and personal representatives of the second lunatic, the proceeds both of the sales and the leases effected after she became such belonged to her heir-at-law as real estate. But it

[1] See Lun. Act, 1890 (53 & 54 Vict. c. 5), s. 120.

[2] *Re* Dicconson, 15 Ch. D. 316.

[3] 53 & 54 Vict. c. 5, s. 123.

was held (4) that the shares of both the lunatics in the proceeds of the sale and lease in which the second lunatic concurred were converted and belonged to the second lunatic's next of kin.[1]

SECT. 2.—TENANT FOR LIFE.

(α) *Lands Clauses Cons. Act*, 1845.

May sell.

A tenant for life may sell minerals under section 7 of the Lands Cl. Act. But, if he does, and if, at the time the minerals are not in lease, he is only entitled to the income of the proceeds, and he is not entitled to the corpus or to an apportioned part of it. And it is immaterial, that he is unimpeachable for waste; or that the whole of the minerals could probably have been worked out during his lifetime; or even that a specified part of them could, but for pending litigation between him and the purchasing company, have been worked out prior to the sale. He cannot be said to be a "party becoming absolutely entitled to such money" within section 69 of the Act.[2]

(β) *Settled Estates Act*, 1877.

May sell under Court.

Under the Settled Estates Act, 1877, sales of land containing mines or quarries may, under the authority of the Court, be obtained at the instance of a tenant for life.[3] And on any sale of land, which may be authorised, "any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenant or submit to any restrictions which the Court may deem advisable."[4] And the Court has power under the Act to authorise a sale of mines with an exception of the surface;[5]

[1] *Re* Smith, 10 Ch. 79, a decision under the repealed Lun. Reg. Act, 1853.

[2] Robinson's Settlement Trusts, 1891, 3 Ch. 129: see also *post*, pp. 412, 413.

[3] S. 16. Leave to sell is obtainable at the instance of "any person entitled to the possession, or to the receipt of the rents and profits, of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate" (s. 23).

[4] S. 19. For the form of the order, see Set. 1801, 1802; *Re* Barrow, Set. 1802, 1803.

[5] *Re* Mallin's Settled Estates, 3 Giff. 126, nom. *Re* Law, 7 Jur., N. S. 511; *Re* Gray's Estates, W. N. 1875, p. 106; decisions under the repealed Act 19 & 20 Vict. c. 120, s. 11. See the former case for an illustration of the terms on which such a sale may be sanctioned. For the form of the order, see Set. 1801.

or, with an exception of the surface, a grant of mining easements over the surface, and a reservation of rent in consideration of such grant.[1]

Application of proceeds.

All money to be received on any sale effected under the authority of the Act may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise must be paid into Court; and such money must be applied, as the Court may from time to time direct, to some or one of the purposes mentioned in the Act;[2] or if in Court, it may be invested or applied as capital money arising under the Settled Land Act, 1882.[3] And until the money can be so applied it must be invested, and the dividends paid to the parties entitled.[4]

(γ) *Settled Land Acts.*[5]

Meanings of "mines and minerals" and "mining purposes."

In the Settled Land Act, 1882, "mines and minerals mean "mines and minerals whether already opened or in work, or "not,[6] and include all minerals and substances in, on, or under "the land, obtainable by underground or by surface working;"[7] and "mining purposes include the sinking and searching for, "winning, working, getting, making merchantable, smelting, "or otherwise converting or working for the purposes of any "manufacture, carrying away, and disposing of mines and "minerals, in or under the settled land, or any other land, and "the erection of buildings, and the execution of engineering "and other works, suitable for those purposes."[8]

May sell, enfranchise, exchange, or partition

Section 3 of the Settled Land Act, 1882, provides that a tenant for life:—

"(i) May sell the settled land, or any part thereof, or any "easement, right, or privilege of any kind, over or in relation "to the same; and

"(ii) Where the settlement comprises a manor, may sell

[1] *Re* Milward's Estate, 6 Eq. 248, a decision under the same Act. For the form of the order, see Set. 1801, 1802.

[2] S. 34: see also s. 35.

[3] 45 & 46 Vict. c. 38, s. 32: see *post*, p. 152.

[4] S. 36. For the form of order, see Set. 1800. For an order authorising a sale with an exception of minerals and approving of the investment of part of the proceeds in the purchase of other land, see *Re* Okeover; Wheeler *v.* Tootel, Set. 1805.

[5] 1882, 1884, 1887, 1889, and 1890.

[6] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[7] S. 2: cf. *ante*, pp. 5 *et seq.* The expression "mines or minerals" is occasionally used in the Act; but this, of course, is equivalent to "mines and minerals."

[8] S. 2.

"the seignory of any freehold land within the manor, or the "freehold and inheritance of any copyhold or customary land, "parcel of the manor, with or without any exception or "reservation of all or any mines or minerals, or of any rights "or powers relative to mining purposes, so as in every such "case to effect an enfranchisement; and"

May (iii) and (iv) make an exchange and concur in making a partition.

Incidental regulations.

Section 4 of the same Act provides that :—

"(6) On a sale, exchange, or partition any restriction or "reservation . . . with respect to mines and minerals, or "with respect to or for the purpose of the more beneficial "working thereof, . . . may be imposed or reserved and "made binding, as far as the law permits, . . . on the "tenant for life and the settled land, or any part thereof, "or on the other party and any land sold or given in exchange "or on partition to him."

"(7) An enfranchisement may be made with or without "a regrant of any . . . right, easement, or privilege thereto- "fore appendant or appurtenant to or held or enjoyed with "the land enfranchised, or reputed so to be."

And section 5 of the Act of 1890 provides that "on an "exchange or partition any easement, right, or privilege of any "kind may be reserved or granted."

Separate dealing with surface and minerals.

Section 17 of the Act of 1882 provides that :—

"(1) A sale, exchange, partition, or mining lease, may be "made either of land, with or without an exception or reser- "vation of all or any of the mines and minerals therein, or "of any mines and minerals, and in any such case with or "without a grant or reservation of powers of working, way- "leaves or rights of way, rights of water and drainage, and "other powers, easements, rights, and privileges for or incident "to or connected with mining purposes, in relation to the "settled land, or any part thereof, or any other land.

"(2) An exchange or partition may be made subject to "and in consideration of the reservation of an undivided "share in mines or minerals."

Deeds and contracts.

A tenant for life has corresponding powers of executing deeds,[1] and of entering into preliminary contracts ;[2] and he

[1] S. 20. [2] S. 31.

may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title.[1]

Capital money—application.

Section 21 of the Act of 1882 provides, that "capital money" arising under the Act must in general be invested or applied in some or one of the modes therein mentioned, which include the following:—

"(iii) In payment for any improvement authorised by this "Act;"

"(vii) In purchase of land in fee simple, or of copyhold "or customary land, or of leasehold land held for sixty years "or more unexpired at the time of purchase, subject or not "to any exception or reservation of or in respect of mines "or minerals therein, or of or in respect of rights or powers "relative to the working of mines or minerals therein, or "in other land:

"(viii) In purchase, either in fee simple or for a term of "sixty years or more, of mines and minerals convenient to "be held or worked with the settled land, or of any ease-"ment, right, or privilege convenient to be held with the "settled land for mining or other purposes."[2]

Settlement of land purchased, &c.

Section 24 of the Act provides that:—

"(1) Land acquired by purchase or in exchange, or on "partition, shall be made subject to the settlement in manner "directed in this section."

"(7) The provisions of this section referring to land extend "and apply, as far as may be, to mines and minerals, and "to easements, rights, and privileges over and in relation "to land."

Improvements with capital money.

Section 25 of the Act provides, that improvements authorised by the Act are the making or execution on or in connection with and for the benefit of settled land of any of the works or operations therein mentioned, which include the following:—

"(xv) Jetties, piers, and landing places on rivers, lakes, "the sea, or tidal waters, for facilitating transport . . . of "minerals, and of things required for mining purposes:"

"(xviii) . . . brick-making, tile-making, and other works "necessary or proper in connection with any of the objects "aforesaid:

[1] S. 6 of Act of 1890.

[2] See also s. 1 of Act of 1887; s. 13 of Act of 1890.

"(xix) Trial pits for mines and other preliminary works "necessary or proper in connection with development of "mines:

"(xx) Reconstruction, enlargement, or improvement of any "of those works."

Meanings of sub-clauses (xix) and (xx).

The words "other preliminary works," in sub-clause (xix) of section 25, mean preliminary works necessary for the development of mines; such, for example, as putting down a pump on a small scale for working a single seam.[1] The scope of sub-clause (xx) is wider. The word "reconstruction" would authorise the reconstruction of the pump, if necessary; and would do so not merely while the preliminary works were proceeding, but after they had ceased to be preliminary, and had become permanent. And the words "enlargement or improvement" would authorise the substitution, if necessary, of a new pump for the existing one; and the words "reconstruction, enlargement, or improvement" would authorise necessary works in connection not merely with the single seam originally worked, but with other seams subsequently worked.[2] Accordingly, where lands containing mines were settled by deed with legal limitations, and with a term to trustees of a power of sale and exchange; and the settlor subsequently devised other lands to the same trustees to hold to uses and upon trusts corresponding with those in the deed; and he bequeathed his residuary personal estate upon trust to purchase land and settle it to the same uses; it was held, that some of the personal estate, which had not yet been invested in land, might be applied in the erection of a new pumping-engine and pumps for draining some mines included in the deed.[3]

Protection as regards waste in execution of improvements.

Section 29 of the Act of 1882 provides, that "the tenant "for life . . . may from time to time enter on the settled "land, and, without impeachment of waste by any remainder-"man or reversioner, thereon execute any improvement "authorised by this Act . . . and get and work freestone, "limestone, clay, sand, and other substances, and make "tramways and other ways, and burn and make bricks, tiles, "and other things. . . ."

[1] Mundy's Settled Estates, 1891, 1 Ch. 403, 404.

[2] *Ib.* 403—405.

[3] *Ib.* 399.

Where other powers available.

Section 56 of the Act of 1882 provides, that, where recourse may be had to other powers, they are not prejudicially affected by the powers of the Act. The powers of the "Act are cumulative." "But, in case of conflict between the provisions of "a settlement and the provisions of this Act relative to any "matter in respect whereof the tenant for life exercises or con- "tracts or intends to exercise any power under this Act, the "provisions of this Act shall prevail; and accordingly, not- "withstanding anything in the settlement, the consent of the "tenant for life shall, by virtue of this Act, be necessary to "the exercise by the trustees of the settlement or other person "of any power conferred by the settlement exercisable for any "purpose provided for in this Act."

Where Act and settlement not in conflict.

Where the only power of sale in a settlement was the ordinary power to sell the whole land; and the power was exercisable by the trustees with the consent of the guardians of the tenant for life during minority; and it was proposed to proceed under section 17 of the Act of 1882;[1] it was held, that the trustees might sell without the consent of the guardians.[2]

Sect. 3.—TRUSTEES.

(*a*) *Sale.*

May not *primâ facie* sell, or separately sell, surface and mines.

Of course trustees have no power, *primâ facie*, of their own motion, to sell lands containing mines or quarries. And where trustees of a settlement, under which a tenant for life without impeachment of waste is in possession, have a mere power to sell the lands, without more, they have no right, of their own motion, to sell them with an exception of the mines.[3] If trustees had such a right, it might be in the power of a tenant for life, without impeachment of waste, to leave no estate whatever for his successor in title. The trustees might exercise their right, and might with the proceeds of sale purchase land which itself contained mines, and which the tenant for life could not be prevented from working.[4] The position is similar in the case of partition.[5]

[1] *Ante*, p. 151.

[2] Newcastle's Estates, 24 Ch. D. 129. As to procedure, see Settled Land Act Rules, 1882.

[3] Buckley *v.* Howell, 29 Beav. 546: cf. Plymouth *v.* Archer, 1 B. C. C. 159, 160.

[4] See Buckley *v.* Howell, *sup.*; *Re* Gladstone, 1900, 2 Ch. at p. 106.

[5] See *Re* Brooks, cited in Farwell on Powers at p. 360.

Section 44 of the Trustee Act, 1893,[1] as amended by section 3 of the Trustee Act, 1893, Amendment Act, 1894,[2] provides as follows :— Trustee Act, 1893.

"(1) Where a trustee or other person is for the time being "authorised to dispose of land by way of sale, exchange, "partition, or enfranchisement, the High Court may sanction "his so disposing of the land with an exception or reservation "of any minerals, and with or without rights and powers of "or incidental to the working, getting, or carrying away of "the minerals, or so disposing of the minerals, with or with-"out the said rights or powers, separately from the residue of "the land.

"(2) Any such trustee or other person, with the said sanction "previously obtained, may, unless forbidden by the instrument "creating the trust or direction, from time to time, without "any further application to the Court, so dispose of any such "land or mineral.[3]

"(3) Nothing in this section shall derogate from any power "which a trustee may have under the Settled Land Acts, 1882 "to 1890, or otherwise."

Practice under Act.

The Court will make an order authorising the sale of land with an exception of the mines, or of the mines with an exception of the surface, in general terms, and without reference to any particular sale.[4] An application to the Court must be by petition ;[5] and may be made by the trustees authorised to dispose of the land as in the section mentioned ;[6] that is, by way of sale, exchange, partition, or enfranchisement. A petition by trustees, who have a power of sale exercisable with the consent of the tenant for life, for leave to sell the lands and minerals separately, need not, if served on the tenant for life, be served on the remainderman.[7] But in

[1] 56 & 57 Vict. c. 53.

[2] 57 & 58 Vict. c. 10.

[3] These provisions replace those of the repealed Conf. of Sales Act, 1862 ; which were to the same effect. The latter Act was passed for the purpose of altering the law as laid down in Buckley *v.* Howell, *sup.* It also confirmed previous sales affected by that decision.

[4] Willway's Trust, 32 L. J. Ch. 226 ; Wynn's Devised Estates, 16 Eq. 237 ; decisions under the repealed Conf. of Sales Act.

[5] R. S. C., O. 54 B, r. 2.

[6] *Ib.* r. 3.

[7] Pryse's Estates, 10 Eq. 531 ; Powell's Will, 23 W. R. 151 ; Nagle's Trusts, 6 Ch. D. 104 ; decisions under the repealed Conf. of Sales Act ; *Re* Skinner, W. N. 1896, p. 68 : see also Wynn's Estates, *sup.*

other cases the *cestuis que trustent* must either be co-petitioners, or appear and consent.[1]

(β) *Purchase and Mortgage.*

May not in general purchase or lend on mines.

Trustees, who hold money for investment in or on land, are not generally empowered to purchase, or lend money on, land containing mines or quarries.[2] It would seem, however, that trustees cannot be prevented from purchasing land containing mines or quarries, opened or unopened, if such an investment would be plainly beneficial for all the parties interested.[3] And, assuming, that they act without any desire to favour a tenant for life to the prejudice of a remainderman, or a remainderman to the prejudice of a tenant for life, the facts, that a tenant for life may work open mines,[4] or, if dispunishable for waste, unopened mines ;[5] and that a tenant for life punishable for waste cannot work unopened mines ;[6] are, it would seem, immaterial.[7] Where a testator directed trustees to invest trust moneys in land adjoining to, or convenient to be held with, other land devised by him in strict settlement, the Court sanctioned an investment in mines partly under and partly beside such other land.[8]

(γ) *Express Powers—Construction.*

Express powers.

Where a settlor desires to create an express power to sell or to purchase mines or quarries, he should, it would seem, make the trustees of the settlement the donees of the power.[9]

Construction.

Mines and quarries being the subject-matter of an exception, and not of a reservation,[10] they would not, it has been said, be construed as coming within the word "reservations" in a power of sale.[11] Nor would they, it has been said, be construed

[1] Brown's Trust Estate, 32 L. J. Ch. 275; Palmer's Will, 13 Eq. 408: and see *Re* Hirst's Mortgage, 45 Ch. D. 263; decisions under the repealed Conf. of Sales Act. For forms of orders, see *Re* Cawdor; *Re* Trevor-Roper; *Re* Bowes Estate Act; *Re* Willway's Trusts; *Re* Brown's Trusts, Set. 1748.

[2] See *Re* Whiteley, 33 Ch. D. 347, 12 A. C. 727; *Re* Turner, 1897, 1 Ch. 542, 543.

[3] See Buckley *v.* Howell, 29 Beav. 552, 553. As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[4] *Ante*, p. 84.

[5] *Ante*, p. 94.

[6] *Ante*, p. 90.

[7] See Buckley *v.* Howell, *sup.*

[8] Bellot *v.* Littler, 22 W. R. 836.

[9] See Vivian *v.* Jegon, L. R. 3 H. L. 290.

[10] See *post*, p. 223.

[11] Doe *v.* Lock, 2 A. & E. 705.

as coming within the words "rent and reservations" where there were, in fact, reservations besides rent.[1] And it has been said to be doubtful, whether they would be construed as coming within those words, where there appeared to be, in fact, no reservation except rent.[2]

SECT. 4.—MORTGAGEE.

Mortgagee.

The expression "other person," mentioned in section 44 of the Trustee Act, 1893, as amended by section 3 of the Amendment Act, 1894, includes a mortgagee.[3] A mortgagee who applies under the Act must apparently serve the mortgagor, and also subsequent encumbrancers (if any).[4]

SECT. 5.—CO-OWNERS AND PARTNERS.

(*a*) *Transfer of Share.*

Co-owner.

Any co-owner of a mine or quarry may transfer his share without the consent of the other or others.[5]

Partner in working.

Any partner at will in the working of a mine or quarry, who is a mere co-owner of the land itself, may transfer his share both in the land and in the working without the consent of the other or others.[6] Before the Partnership Act, 1890,[7] such a transfer operated as a dissolution of the partnership ;[8] and, if any subsequent working was carried on between the

[1] Doe *v.* Lock, 2 A. & E. 705.

[2] *Ib.*

[3] See Beaumont's Mortgage Trusts, 12 Eq. 86; Wilkinson's Mortgaged Estates, 13 Eq. 634; Hirst's Mortgage, 45 Ch. D. 263; decisions under the repealed Conf. of Sales Act.

[4] See Hirst's Mortgage, *sup.*, *per* North, J.: see, however, Beaumont's Mortgage Trusts, *sup.*, *per* Malins, V.-C.; Wilkinson's Mortgaged Estates, *sup.*, *per* Wickens, V.-C.

[5] Crawshay *v.* Maule, 1 Swanst. 505, 518, 519, 523; Bentley *v.* Bates, 4 Y. & C. Eq. Exch. 189: see Steward *v.* Blakeway, 6 Eq. 479, 4 Ch. 603.

[6] See Crawshay *v.* Maule, *sup.* 517—519, 523; Bentley *v.* Bates, *sup.* 189. It will be observed, that in Crawshay *v.* Maule (see Roberts *v.* Eberhardt, Kay, 155), and apparently also in Bentley *v.* Bates, the partnership was at will.

[7] 53 & 54 Vict. c. 39.

[8] See Lindley, 620. See Crawshay *v.* Maule, *sup.* 525; Bentley *v.* Bates, *sup.* 189. In Fereday *v.* Wightwick, 1 R. & My. 49 (the report in Taml. 261 does not contain the words), it was said, "The shares" in a mining concern "are assignable, and the death or bankruptcy of the holder of shares does not operate as a dissolution"; and a similar statement was made in *Ex parte* Broadbent, 1 M. & A. 638. But these propositions cannot, except as respects cost-book mines (as to which see p. 519 of the 3rd edition of this book), be sustained. See Jefferys *v.* Smith, 3 Russ. 167, 168; Tatam *v.* Williams, 3 Ha. 355.

old partners and the transferee, it was by virtue of a fresh partnership arrangement. Any partner for a term in the working of a mine or quarry, who is a mere co-owner of the land, has a similar right of transfer;[1] and such a transfer did not before the Partnership Act, 1890,[2] necessarily operate as a dissolution, but gave the old partners a right to treat it as a dissolution or not at pleasure.[3] Since the Partnership Act, 1890, it seems that the assignment of a share does not in any case dissolve, or give an absolute right to dissolve, the partnership, but is merely a circumstance enabling the Court to decree a dissolution if it thinks fit.[4]

Ordinary partner.

Any ordinary partner, either at will or for a term, in a mine or quarry, may transfer his share without the consent of the other or others. The effect of such a transfer is the same as the effect of a transfer by a person who is a partner in the working, but a mere co-owner of the land.[5]

(β) *Partition.*

Co-owner.

Any co-owner of a mine or quarry may have a partition of the whole mine or quarry,[6] unless (as usually happens, from the impossibility or inconvenience of having a partition, it would be more proper to direct a sale.[7]

Partner in working.

And any partner in the working of a mine or quarry, who is a mere co-owner of the land itself, has a similar right;[8] either before or upon a dissolution.[9]

Ordinary partner.

But no ordinary partner in a mine or quarry is entitled, against the will of his co-partners, to have the mine or quarry partitioned.[10]

[1] See *Ex parte* Broadbent, 1 M. & A. 638.

[2] 53 & 54 Vict. c. 39.

[3] See Lindley, 620. See Perens *v.* Johnson, 3 Sm. & G. 424. It will be observed, that in Bentley *v.* Bates, *sup.*, where the L. C. B. (p. 189) says, "Why pray for a dissolution in a case where you may dissolve the partnership itself by selling your own share?" it does not appear that the partnership was anything more than at will.

[4] Lindley, 621.

[5] See preceding page and *sup.*

[6] Crawshay *v.* Maule, 1 Swanst. 518. For a decree for a commission to set out the boundaries of two collieries, and the commissioners to look into both the collieries and see how the one intermixed with the other, and to set down temporary boundaries; and the order on further consideration confirming the certificate and directing the collieries to be held and enjoyed accordingly, see Collingwood *v.* Jenison, Set. 1893.

[7] See Wild *v.* Milne, 26 Beav. 504.

[8] His right in this respect cannot be less than if he was not a partner.

[9] See Wild *v.* Milne, *sup.*

[10] *Ib.*

(γ) *Sale of Entirety.*

Co-owner or partner in working—Partition Acts.

Independently of the Partition Acts,[1] a co-owner of a mine or quarry is not entitled, as of right, to have the whole mine or quarry sold.[2] Nor is a partner in the working of a mine or quarry, who is a mere co-owner of the land itself, so entitled; either previously to or upon a dissolution.[3] However, a sale may be had under the Partition Acts where the sale provisions of the Acts are applicable. Where a sale of land is directed under the Acts, the Court will not in general reserve the minerals.[4]

Ordinary partner may have sale without regard to Acts.

Any partner is in general entitled, in an action seeking for dissolution and accounts, and without regard to the Partition Acts, to have the whole concern sold.[5] The other partners cannot, for example, in the absence of contract, insist upon taking his share at a valuation. They would have no such right in an ordinary trading concern; and a mining concern for this purpose stands upon the same footing.[6] But where there is a contract, the other partners may in general, it would seem, insist upon taking the share of one of the partners at a valuation; even although the partnership has been dissolved by the bankruptcy of that partner.[7] Where a sale is decreed, the Court will, pending the execution of the decree, appoint a receiver and manager.[8] However, where one partner is an infant, and a proposal is made by the co-partner to buy the share of the infant, and it appears that it would be for the

[1] 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17.

[2] Crawshay *v.* Maule, *sup.* 505, 518, 519, 523; Steward *v.* Blakeway, 4 Ch. 609, 610.

[3] Steward *v.* Blakeway, *sup.*

[4] See Lawe *v.* Stoney, W. N. 1876, p. 141.

[5] Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Crawshay *v.* Maule, 1 Swanst. 505, 518, 519, 523; Roberts *v.* Eberhardt, Kay, 155, 160; Lees *v.* Jones, 3 Jur., N. S. 954; Wild *v.* Milne, 26 Beav. 504; Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302; Burdon *v.* Barkus, 4 De G. F. & J. 49, 50; Steward *v.* Blakeway, 4 Ch. 609, 610: see Tatam *v.* Williams, 3 Ha. 355, 346.

[6] See Hart *v.* Clarke, 6 De G. M. & G. 249—251 (affirmed, Clarke *v.* Hart, 6 H. L. C. 633): see *ante*, p. 95, n. [5], and other cases there cited: see also Burdon *v.* Barkus, *sup.*; varying upon this point S. C. 3 Giff. 431, 432.

[7] See Whitmore *v.* Mason, 2 J. & H. 204, 209, 215, 216.

[8] See Crawshay *v.* Maule, *sup.* 507, 526, 529; Lees *v.* Jones, *sup.*; Roberts *v.* Eberhardt, *sup.* 160; Wild *v.* Milne, *sup.* 506; Rowlands *v.* Evans, *sup.* 310—312. For the form of the order, see Clegg *v.* Fishwick, Set. 764. In Hart *v.* Clarke (*sup.* 254, 255), a receiver and manager was appointed, a dissolution only being decreed, and the question of a sale being reserved until the accounts were taken.

benefit of the infant that such proposal should be accepted, its acceptance will be sanctioned by the Court, and a sale of the whole mine dispensed with.[1]

Time of sale.

A sale, to take place immediately after judgment, cannot be required as a matter of right. "The Court, if it directs a sale, will so direct it, that the property may be so sold in the manner most beneficial for all parties interested. . . . The state of the market varies so much, that a sale, which might be beneficial at one moment, and prejudicial at another, cannot be ordered without inquiry."[2] And an inquiry will in most cases be directed, whether it will be for the benefit of all persons concerned in the works that the same should be sold, and in what manner, as going works; or that they should be carried on for the purpose merely of winding up the concern.[3] And if, in an action seeking for accounts and consequential relief, it is doubtful whether, after debiting the plaintiff with the sums which he ought to have contributed towards the working, a balance will be found due to him, although a dissolution may be adjudged, and accounts ordered to be taken, and a receiver and manager appointed, the question of a sale will usually be reserved until the accounts have been taken.[4] On the other hand, where a partnership has been dissolved, and the circumstances of the case require it, an order for the sale may be obtained on interlocutory application before judgment.[5] Indeed, such an order has been obtained, even before dissolution, to prevent a total loss.[6]

Mode of sale.

A sale by auction will usually be directed. And in such a case some indifferent person well acquainted with mining property will be appointed to conduct the sale, and liberty to bid will be given to all the partners.[7] Sometimes it is impossible to carry out the sale by public auction. The mine or quarry

[1] Crawshay *v.* Maule, 1 Swanst. 530.

[2] *Ib.* 506, 529, *per* Lord Eldon.

[3] See the form of the inquiry directed in Crawshay *v.* Maule, *sup.* 529: see also Clegg *v.* Fishwick, Set. 2168, 2169; Lees *v.* Jones, 3 Jur., N. S. 955; Wild *v.* Milne, 26 Beav. 506.

[4] See Hart *v.* Clarke, 6 De G. M. & G. 232, 254, 255: affirmed Clarke *v.* Hart, 6 H. L. C. 633.

[5] Crawshay *v.* Maule, *sup.* 495, 506, 523.

[6] See Heath *v.* Fisher, 38 L. J. Ch. 14.

[7] Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302, 310: see Lees *v.* Jones, 3 Jur., N. S. 955. In Wild *v.* Milne, 26 Beav. 504, one of the partners was given the conduct of the sale, and liberty was given to the others to bid.

may, for example, be held on leave, and the lease may contain a covenant not to assign without licence. In such a case the sale will be directed to be carried out by private contract.[1]

Impossibility of sale.

Where no sale, either by public auction or private contract, can be effected; as where the mine or quarry is leasehold, and there is a covenant not to assign without licence, and the lessor refuses to accept the proposed vendee as his tenant; the partnership may, of course, be nevertheless dissolved; but the parties will have imposed upon them the position of co-owners of the land,[2] and become subject to the doctrines applicable to co-ownership.[3] Where a decree has been obtained for a dissolution and a sale, the Court will sometimes, at the instance of a small minority of the partners, and against the desire of the others, sanction an advantageous, although expensive and important, alteration in the working, if it can be shown, that it is impossible to effect the sale, but not otherwise.[4]

SECT. 6.—COMPANIES, LOCAL AUTHORITIES, &c.

Lands Clauses Act.

Companies, local authorities,[5] and other bodies purchasing lands under the Lands Cl. Cons. Acts, 1845,[6] have power to purchase the mines and minerals thereunder.[7] And this power is not confined to cases, where the mines and minerals and the rest of the land from the surface down to the centre belong to the same vendor, and the purchase of the minerals is merely part of the purchase of the whole land. It extends to cases where the mines and minerals and the rest of the land are in different owners. If the law were otherwise, the construction of their works might become impossible.[8] Section 334 of the Pub. Health Act, 1875, provides that "nothing in this Act

[1] Lees *v.* Jones, 3 Jur., N. S. 955. See, however, Perens *v.* Johnson, 3 Sm. & G. 427.

[2] Lees *v.* Jones, *sup.*: see Perens *v.* Johnson, *sup.* 426, 427.

[3] Lees *v.* Jones, *sup.*: see *ante*, pp. 135 *et seq.*

[4] Lees *v.* Jones, *sup.* 954.

[5] See s. 176 of Pub. Health Act, 1875, which incorporates the Lds. Cl. Cons. Act. Similar powers are vested in County Councils (s. 65 of the Loc. Gov. Act, 1888) and Parish Councils (s. 9 of Loc. Gov. Act, 1894). See also the Small Holdings and Allotments Act, 1908; Housing, Town Planning, &c., Act, 1909: see also *post*, pp. 432, 433.

[6] 8 & 9 Vict. c. 18, ss. 16 *et seq.*

[7] Errington *v.* Met. R. Co., 19 Ch. D. 559, 568, 569, 573, 578.

[8] *Ib.* 569, 578.

"shall be construed to extend to mines of different descriptions "so as to interfere with or obstruct the efficient working of "the same, nor to the smelting of ores and minerals, nor to the "calcining, puddling, and rolling of iron and other metals, "nor to the conversion of pig-iron into wrought iron, so as to "obstruct or interfere with any of such processes respectively." But this provision does not restrict the powers of local authorities to purchase mines; its obvious application being to nuisances only.[1]

Rail. & Wat. Clauses Acts.

And the company or other body in question are none the less empowered to purchase mines and minerals because the provisions of the Rail. Cl. Act,[2] the Wat. Cl. Act,[3] or the Pub. Health Am. Act, 1883,[4] may apply to them.[5] A railway company purchasing under the Rail. Cl. Act are not "entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines excepting as aforesaid shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."[6] And the Wat. Cl. Act[7] and (by reference to that Act) the Pub. Health Am. Act, 1883,[8] contain provisions substantially identical.[9] Although, therefore, the normal procedure is the purchase of the land without the mines,[10] the mines may be included, if expressly purchased. A railway company or other body may purchase either by agreement or compulsorily.[11] And the provisions of the Acts apply

[1] See *Re* Dudley, 8 Q. B. D. 86, 96, 97, *per* Brett, Cotton, and Lindley, L.JJ. Denman, J. (90), considered it to refer to open mines (as to which see *ante*, pp. 55 *et seq.*), as opposed to possible future mines.

[2] 8 & 9 Vict. c. 20, s. 77.

[3] 10 & 11 Vict. c. 17, ss. 12, 18.

[4] 46 & 47 Vict. c. 37.

[5] Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421; Hooper *v.* Bourne, 3 Q. B. D. 258, 5 A. C. 1, 23, 24; Errington *v.* Met. R. Co., 19 Ch. D. 559, 569, 572; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 556; Pountney *v.* Clayton, 11 Q. B. D. 833; Mid. R. Co. *v.* Robinson, 15 A. C. 35; Holliday *v.* Wakefield, 1891, A. C. 86; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 113, 123.

[6] 8 & 9 Vict. c. 20, s. 77. Working without purchasing will, of course, be restrained: Maritime, &c., Co. *v.* Barry, &c., Co., 2 T. L. R. 803.

[7] 10 & 11 Vict. c. 17, ss. 12, 18.

[8] 46 & 47 Vict. c. 37.

[9] As to parish councils, see Loc. Gov. Act, 1894, s. 9, sub-s. 10: see also *post*, pp. 432, 433.

[10] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 113.

[11] *Ib.* 112, 113.

equally to minerals worked by surface as to those worked by underground workings.[1]

Mines as separate tenement.

And such a company or other body may purchase the mines and minerals as a separate tenement.[2] Nor do the words "expressly purchased" confine their power to purchases by agreement only. They are empowered to purchase the mines and minerals as a separate tenement by compulsion.[3] And the mere fact, that they may have already purchased the surface as a separate tenement does not exhaust their power. They may at any time subsequently, within the period limited for the exercise of their powers, purchase the underlying mines and minerals. For there can be no distinction in principle between a power to make successive vertical purchases of the surface and the underlying strata, and a power to make successive horizontal purchases of the surface only.[4] And they may purchase the whole of the underlying mines and minerals, or a part only, at their option.[5]

Restrictions upon such powers.

The power of purchase of such a company or other body is, however, only exercisable in respect of mines and minerals lying under lands within the limits of these described.[6] And their compulsory power is only exercisable within the prescribed time.[7] But after the expiration of their compulsory power, they may purchase minerals within such limits by agreement.[8] Of course a railway or other body are only empowered to purchase for the purposes of the works authorised to be constructed by them.[9]

[1] Glasgow *v.* Farie, 13 A. C. 678, 688: and see *ante*, pp. 34, 48. For the general effect of the statutory provisions, see *post*, pp. 225, 226.

[2] Errington *v.* Met. R. Co., 19 Ch. D. 559, 569.

[3] *Ib.* 559, 569, 573, 574, 578, 579; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 113, 123; notwithstanding the dicta to the contrary of Lords Cranworth and Westbury in G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 40, 41; and of James, L.J., in G. W. R. Co. *v.* Smith, 2 Ch. D. 244.

[4] Errington *v.* Met. R. Co., *sup.* 559, 570, 574, 575.

[5] *Re* Gerard and L. & N. W. R. Co., 1894, 2 Q. B. 922: see also S. C. 1895, 1 Q. B. 464, *per* Lord Esher.

[6] Errington *v.* Met. R. Co., 19 Ch. D. 570, 575.

[7] *Ib.*; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 112, 113.

[8] Thompson *v.* Hickman, 1907, 1 Ch. 550; L. & N. W. R. Co. *v.* Howley Park, &c., Co.

[9] Pountney *v.* Clayton, 11 Q. B. D. 829, 830; *Re* Gerard and L. & N. W. R. Co., 1894, 2 Q. B. 922; Thompson *v.* Hickman, *sup.*

Position of copyholder.

If a copyholder's right of possession entitles him, on surrendering, to except the mines,[1] a company or other body desiring to acquire the entire interest in the mines will not do so unless they purchase the copyholder's interest in express terms.

Effect of power to prevent working.

The power vested in such a company or other body [2] of preventing the working of a mine upon the terms of compensating the owner is an additional and independent power, and does not restrict their power of purchase.[3] For it may well be more convenient for them to purchase the mines when they are raising their funds ; [4] and they may be able to obtain them at a smaller price than if they waited until the commencement of the mining operations.[5] Moreover, it may be that they may require to use the space occupied by the minerals. Those minerals may, for example, be insufficient to afford adequate support to their works ; and their removal and the substitution of artificial props may be necessary for that purpose. Or the space in question may be necessary for some such purpose as the construction of culverts. Indeed, as in the case of minerals which are not such within the meaning of the Acts,[6] the purchase may well be indispensable to the existence of the railway or works.[7] But, against the will of the landowner, none of these objects can be accomplished without acquiring the property in the minerals.[8]

Evidence as to necessity or propriety of purchase.

Whenever the necessity or propriety of a purchase is contested, the opinion of the officer of the company or other body, if *bonâ fide*, is the only evidence required ; and a mere general statement that the minerals in question are required is a sufficient expression of opinion. The onus of proving that they are wanted for some collateral purpose, or that the alleged purpose is manifestly absurd, or that there is in other respects want of *bona fides*, rests upon the landowner.[9]

[1] See *ante*, p. 68.

[2] See s. 78 of Rail. Cl. Act, s. 22 of Wat. Cl. Act, and the Pub. Health Am. Act, 1883, cited *post*, pp. 370—379.

[3] Errington *v.* Met. R. Co., 19 Ch. D. 569—571, 575, 576.

[4] Errington *v.* Met. R. Co., *sup.* 570, 571.

[5] *Ib.* 578. See Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. at 296, *per* Farwell, J.

[6] See *ante*, pp. 43—48.

[7] See Glasgow *v.* Farie, 13 A. C. 698, *per* Lord Macnaghten ; *ante*, pp. 38, 39, 45..

[8] Errington *v.* Met. R. Co., *sup.* 572, 574—576.

[9] *Ib.* 569, 571, 576, 577.

Obligation to purchase.

It is obligatory on a company or other body purchasing from a landowner under the exclusive provisions of the Lands Cl. Act to purchase his whole interest from the surface down to the centre ; [1] but a body purchasing under the joint provisions of that Act and of the Rail. Cl. Act, or the Wat. Cl. Act, or the Pub. Health Am. Act, 1883, may elect to buy the land without the mines.[2]

"Superfluous" lands.

Where lands, which a railway company are authorised by their special Act to take, are conveyed to them ; and the conveyance contains an express grant of the mines and minerals thereunder ; and the lands are kept by the company, not *bonâ fide* for the purposes of the undertaking, but merely for the purpose of working the minerals ; that fact is in itself evidence that the lands are "superfluous" within the meaning of section 127 of the Lands Cl. Act.[3] Where, however, the lands are kept under the belief, whether rightly or wrongly, that they will be used at a future time for the purposes of the undertaking, the mere fact that the company in the meantime choose to utilise them by working the minerals thereunder furnishes no such evidence.[4] And if it afterwards turns out, that, although the surface is required for the purposes of the undertaking, those purposes could be answered without preserving to the surface the mineral support, there does not appear to be any authority for saying, either that the company are bound to sell the mines apart from the surface, or that in default of such sale the mines vest in the adjacent owners.[5] Indeed, it has been laid down, that, where in such a case it afterwards turns out that the surface is superfluous, and vests in the adjoining owners, the mines and minerals will not so vest, but will remain the property of the company.[6] But this was doubted in the same case when in the House of Lords.[7]

Power of railway companies and waterworks undertakers to contract out of "code."

There is a difference in language between the Rail. Cl. Act and the Wat. Cl. Act. Section 22 of the latter Act begins with

[1] See Pountney *v.* Clayton, 11 Q. B. D. 833, *per* Brett, M.R.

[2] *Re* Huddersfield and Jacomb, 17 Eq. 476, 489 ; Pountney *v.* Clayton, *sup.* 833, 835 ; Holliday *v.* Wakefield, 1891, A. C. 87, 88. See the sections of the Acts, *post*, pp. 370—379.

[3] See Hooper *v.* Bourne, 5 A. C. 22, *per* Lord Blackburn.

[4] *Ib.* 3 Q. B. D. 288, *per* Cotton, L.J. ; 5 A. C. 22, *per* Lord Blackburn.

[5] Hooper *v.* Bourne, 5 A. C. 12, *per* Lord Cairns, 24, *per* Lord Blackburn.

[6] *Ib.* 3 Q. B. D. 258 : see 278, *per* Bramwell, L.J., 284, *per* Brett, L.J.

[7] See 5 A. C. 23, 24, *per* Lord Blackburn.

the words, "Except when otherwise provided for by agreement between the undertakers and other parties;" and sect. 25 with the words, "Except when otherwise provided for by agreement."[1] There are no similar words in sections 78 and 81 of the Rail. Cl. Act.[2] This difference suggested the question, whether railway companies, as well as waterworks undertakers, have power to contract out of the "code" established by the Act in question.[3] In *London and North Western Railway Co.* v. *Howley Park, &c., Co.*[4] Moulton, L.J., said that the words in section 22 of the Wat. Cl. Act "made it clear that the undertakers might contract with these parties for the support of their reservoir . . . in such a way as entirely to oust the machinery provided by the section."[5] . . . "Qualifying language is introduced . . . in the later Act, showing that the substitute of the special rights and obligation . . . is not absolute . . . in the case of waterworks, as it is in the case of railways, but that it may be suspended altogether by contractual arrangement with third parties."[6] The Lord Justice also said, that "the circumstances of a railway company and a waterworks company differ considerably, and it would not be difficult to give substantial reasons, why the Legislature should treat the problem of support from mines differently in the two cases."[7] It is assumed that, in speaking of "third parties" in reference to section 22 the Lord Justice meant "the owner, lessee or occupier" subsequently mentioned in that section, who is undoubtedly the person referred to in the words "by agreement" in section 25. But, making this assumption, the suggested construction would put a serious fetter upon the powers of a railway company, the existence of which has not hitherto been suspected. For some purposes, as, *e.g.*, sections 19, 20, 21 and 27 of the Wat. Cl. Act, the differences in the subject-matter made corresponding differences in the legislation necessary; but the Lord Justice could hardly have been referring to these exceptional matters, and in other respects it is not easy to see, what the "substantial reasons" were. The earlier part of his Lordship's own judgment pointed out

[1] See *post*, pp. 375, 376.
[2] See *post*, pp. 371, 372.
[3] See *post*, pp. 369 *et seq.*
[4] 1911, 2 Ch. 97.
[5] Pp. 124—125.
[6] Pp. 125—126.
[7] P. 125.

the application of section 77 of the Rail. Cl. Act to voluntary, as well as compulsory, purchases.[1] Why, if railway companies can purchase by agreement, should they not have power to enter into such incidental contracts as they please? There is nothing in the Rail. Cl. Act which in terms forbids them. What is there to forbid them by implication? [2]

"Injurious affection."

A mine-owner on whose land, or on land subject to whose rights, a company have entered under compulsory powers, and who is "injuriously affected" by the execution of their works, is entitled to receive compensation under section 68 of the Lands Cl. Act.

Bidder *v.* N. S. R. Co.

In *Bidder* v. *North Staff. Railway Co.*,[3] the plaintiffs were lessees under leases of different durations of two adjoining mines. The company had, under their compulsory powers, taken a portion of the surface over the mine comprised in the longer lease; and had thereby cut off the direct access which had previously existed between that mine and a neighbouring canal. A new access was possible. But it was more circuitous; and it was only obtainable by exercising a right, which the plaintiffs were entitled to exercise,[4] of going over the surface of the mine comprised in the shorter lease. In estimating the injurious affection, it was held (1) that a deduction should be made on account of the power to acquire the new access; but (2) that the circuitousness of the new access, the shorter duration of the lease of the land over which it was obtainable, the damage which it would occasion to such land, and all other like matters, should be taken into consideration, and allowed for, in making the deduction.

Masters and G. W. R. Co.

In *In re Masters and Great Western Railway Co.* [5] the claimant was the lessee of land A., with the shaft, buildings, and works thereon; and of the minerals under land A., and also under land B., which immediately adjoined. Lands A. and B. together comprised 335 acres. The lease contained a proviso, that the claimant might at any time during the term sink a pit or pits in any part of land B., but so that the position of such pit or pits should be subject to the reasonable approval of

[1] See *post*, p. 381.

[2] The sections of each Act which make up the "code" are stated *in extenso*, *post*, pp. 376 *et seq.*

[3] 4 Q. B. D. 412, 432.

[4] See *post*, pp. 475, 478.

[5] 1901, 2 K. B. 84.

the lessor, his heirs or assigns. The company, under an Act incorporating the Lands Cl. Act, purchased from the lessor five acres of land B., not including the minerals thereunder; and occupied it by their railway. It was held that the mere fact that the company had taken the five acres was not a reasonable ground for disapproval of the position of any pit proposed to be sunk thereon, and that the claimant was entitled under the proviso to compensation for being prevented from exercising the right of sinking such pit.[1]

S. 117 Lands Cl. (Scotland) Act.

Section 117 of the Lands Cl. (Scotland) Act, 1845, empowers companies, who enter upon lands, and through "mistake or inadvertency" fail to purchase the interest of any party entitled to an interest therein, to remain in possession, provided that within six months after notice of such interest, or (if the same be disputed) after the right shall have been "finally established," they purchase the same, at a price to be settled (in default of agreement) by arbitration. In *Caledonian Railway Co.* v. *Davidson*,[2] the company (the appellants) in constructing their works, and prior to 1894, removed certain minerals. In proceedings in 1894, the Court reserved all questions of title as to a part of such minerals. In 1896 the respondents applied for compensation for such part, but the company disputed their liability. It was held, that such part in fact belonged to the respondents. But it was also held, that (having regard to the dispute as to the title) the six months had not commenced to run; and that accordingly the appellants were not in the position of trespassers, but were entitled to such part upon payment under section 117.[3]

Sect. 7.—Other Corporations.

Crown lands.

Crown lands [4] are under the management of the Commissioners of Woods; [5] who may sell,[6] exchange,[7] or purchase [8] any mines or quarries; or sell any part of them for the purpose of raising money for the redemption of the land tax charged

[1] Affirming S. C. 1900, 2 Q. B. 677.

[2] 1903, A. C. 22.

[3] Reversing S. C. 37 S. L. R. 150, 406.

[4] The general law only as to Crown lands is here stated. As to mines of coal and iron and quarries of stone within the Hundred of St. Briavels, in Gloucestershire, see Chap. XX. of the 3rd edition of this book; and as to mines of lead in parts of Derbyshire, see Chap. XXI. of the 3rd edition.

[5] See 10 Geo. 4, c. 50, ss. 1, 8.

[6] 10 Geo. 4, c. 50, s. 34.

[7] Ss. 42—44

[8] S. 52.

on any other part.[1] The moneys arising from sales or exchanges, if not immediately wanted, must be invested in consols, and the dividends applied in the same manner as the income of the land revenues is applied.[2]

Duchy of Cornwall lands.

By the Duchy of Cornwall Man. Act, 1863,[3] the Prince of Wales, as Duke of Cornwall, may sell, or enfranchise,[4] or (under the machinery of the Inclosure Acts [5]) exchange [6] any mines or quarries, or may purchase any mines, minerals, or quarries, or rights of mining.[7] All deeds for carrying those purposes into effect must be enrolled in the Duchy office within six months.[8] The moneys arising from sales or exchanges, if not immediately wanted (whether for the purpose of purchasing mines, minerals, quarries, or rights of mining, or for any other purpose), must be invested in consols, and the dividends applied in the same manner as the income of the Duchy lands is applied.[9] In case the Duke of Cornwall for the time being should be under age, the powers given by the Act may be exercised in his name and on his behalf by the Sovereign for the time being.[10] And when the Duchy is vested in the Crown, the powers of the Act may be exercised by the Sovereign for the time being.[11] "Minerals" in the Act include all minerals, whether metallic or not, stone, and substrata of every description.[12]

Church lands —generally.

Every ecclesiastical corporation (with certain exceptions [13]) may in general, with the approval of the Ecclesiastical Commissioners for England, and (if such corporation be the incumbent of a benefice) with the consent of the patron,[14] and upon giving three months' notice in writing to the bishop,[15] sell, or convey in exchange or by way of partition, or otherwise dispose of, mines or quarries belonging to such corporation for such considerations and purposes as the Commissioners may deem reasonable and proper, and give and receive money

[1] S. 59.
[2] Ss. 108—110, 113.
[3] 26 & 27 Vict. c. 49.
[4] Ss. 3, 37.
[5] See *post*, pp. 178, 179.
[6] S. 41.
[7] S. 7.
[8] 26 & 27 Vict. c. 49, ss. 30 *et seq.*
[9] Ss. 8, 13, 14; 31 & 32 Vict. c. 35.
[10] 26 & 27 Vict. c. 49, s. 38.
[11] S. 39. S. 18 provides for the settlement by arbitration of disputes respecting boundaries, or the title to any property, or to any right of way, or water, or other right.
[12] See s. 37.
[13] See 5 & 6 Vict. c. 108, s. 1.
[14] S. 20; 21 & 22 Vict. c. 57, s. 1.
[15] 21 & 22 Vict. c. 57, s. 1.

by way of equality of exchange or partition ; [1] and they may, with the like approval and consent, enter into and vary preliminary contracts.[2] Provisions exist for the application of moneys received in respect of any sale, exchange, or partition.[3]

Land Tax Red. Act.

However, by the Land Tax Red. Act (42 Geo. 3, c. 116), it is provided, that no mines or minerals, or seams or veins of coal, metals, or other like profits belonging to any manors or lands which may be sold by an ecclesiastical corporation for the purpose of redeeming any land tax, whether opened or unopened,[4] shall pass by the conveyance of such manors or lands, either by express or general words ; but (together with all incidental easements) shall be as effectually excepted and reserved as if expressly excepted and reserved.[5] This Act repealed as from the 24th of June, 1802, the Act 39 Geo. 3, c. 21, which contained similar provisions.[6] Accordingly where there was a sale under the repealed Act, with an exception of certain mines (except as therein mentioned) ; and an Act [7] was subsequently passed which confirmed invalid sales under the repealed Act ; it was held that the confirming Act did not so ratify the sale as to give validity to the exception out of the exception.[8] The Acts in question do not, however, affect binding contracts for the sale of lands which had been entered into before they were passed.[9]

Univ. and Coll. lands.

The universities of Oxford, Cambridge, and Durham, and any college therein, and the colleges of Winchester and Eton, may, under the Univ. and Coll. Estates Act, 1898,[10] for the purposes of sale, enfranchisement, exchange, and partition, exercise any of the powers conferred on a tenant for life, by the Settled Land Acts ; [11] and for those purposes the provisions of sections 3, 4 and 17 [12] of the S. L. Act, 1882, apply,[13] subject to certain specified modifications.[14] But the powers are not exercisable without the consent of, and capital money is

[1] Ss. 1, 3.
[2] S. 4.
[3] S. 2 ; 28 & 29 Vict. c. 57.
[4] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*
[5] S. 80.
[6] S. 12.
[7] 57 Geo. 3, c. 100, s. 25.
[8] Whidborne *v.* Eccl. Commrs., 7 Ch. D. 375.
[9] Wilson *v.* Grey, 3 Eq. 117.
[10] S. 1 of 61 & 62 Vict. c. 55.
[11] *Ante*, pp. 150, &c.
[12] *Ante*, pp. 150, 151.
[13] See part 1 of 1st schedule.
[14] See part 2 of 1st schedule.

payable to, the Board of Agriculture.[1] The modifications merely adapt the S. L. Acts to the case of universities and colleges; and include a provision substituting the Board for the trustees of a settlement and for the Court.[2] Capital money may, with the consent of the Board, be applied to any of the purposes therein mentioned;[3] which include purposes similar to those specified in section 21 (vii) and (viii) of the S. L. Act, 1882.[4] The Act of 1898 also provides that the purposes for which money may be borrowed under section 27 of the Univ. and Coll. Estates Act, 1858, shall include improvements[5] similar to those specified in section 25 (xv), (xviii), (xix), and (xx) of the S. L. Act, 1882.[6]

Charity lands.

An assurance for charitable uses may contain a grant or reservation of mines or minerals or of any easement.[7]

Materials for roads.

Trustees or commissioners of turnpike roads are empowered to contract for the purchase of any land for the purpose of digging materials for the repair or use of the roads, and at any time afterwards to sell the land so purchased.[8] Where land has been allotted to or otherwise acquired by a parish, and the materials therein have been exhausted, it may be sold under an order of the Local Government Board; and any right to mines or minerals claimed by the lord of the manor or any other person may be reserved, or the sale may be made subject thereto; and the proceeds of sale are applicable for the benefit of the parish.[9]

SECT. 8.—COPYHOLD AND INCLOSURE ACTS.

a. Copyhold Act, 1894.

Consideration for voluntary enfranchisement.

The consideration for a voluntary enfranchisement under the Copyhold Act, 1894, may be or may include a conveyance of a right to mines or minerals; and a right to mines or minerals subject to the same or corresponding uses and trusts with the land enfranchised may be conveyed as such consideration.[10]

[1] See s. 1.
[2] See part 2 of 1st schedule.
[3] See s. 2.
[4] See *ante*, pp. 152, 153.
[5] S. 3 and 3rd schedule.
[6] See *ante*, pp. 152, 153, and Mundy's Settled Estates there cited.
[7] Mortmain and Charitable Uses Act, 1888, s. 4, sub-s. 4 (ii), (iii). This applies to voluntary assurances as well as to assurances for value.
[8] 3 Geo. 4, c. 126, s. 100.
[9] 39 & 40 Vict. c. 62, ss. 1, 2, 5, and 6: cf. 5 & 6 Will. 4, c. 50, s. 48.
[10] S. 15.

But when the estate of the lord is less than an estate in fee simple in possession, and a right to mines and minerals not in or under the land enfranchised is conveyed as consideration, the right must be convenient, in the opinion of the Board of Agriculture, to be held with the manor, and must be settled to uses or on trusts corresponding to those on which the manor is held.[1] And where any part of the consideration is the conveyance of a right to mines or minerals, the tenant may convey the right to the lord and his heirs to the uses, on the trusts, and subject to the powers and provisions subsisting at the date of the enfranchisement in respect of the manor of which the land enfranchised is held.[2]

Mineral rights not affected without consent.

An enfranchisement under the Act, whether compulsory or voluntary, does not, without the express consent in writing of the lord or tenant, affect the rights of the lord or tenant in mines, minerals, or quarries, whether under the lands enfranchised or not; or any rights of entry, way, and search, and other easements of any lord or tenant; or any powers which but for such enfranchisement might have been exercised for the purpose of working the mines or quarries or carrying away the minerals therefrom.[3] But, without prejudice to these rights and powers, the owners of enfranchisements may disturb and remove the soil for making roads or drains, or erecting buildings, or obtaining water.[4]

Reservation or grant of easements.

Any right of way or other easement in the land enfranchised for more effectually mining and carrying away minerals may, with the consent of the tenant, be reserved or granted to the lord.[5]

Crown manors.

The provisions of the Act relating to the grant of easements to the lord apply to manors vested in the King in right of the Crown or the Duchy of Lancaster; and extend to enfranchisements of lands held of manors vested in the Crown under any existing Act.[6]

b. Inclosure Acts.

(*a*) *Statute of Merton.*

Lord may approve against common of pasture.

Under the right of approving given by the Statute of Merton,[7] the lord of a manor may, as against common of pasture, sell

[1] Copyhold Act, 1894, s. 15.
[2] S. 18.
[3] S. 23, sub-s. 1.
[4] *Ib.*
[5] S. 24, sub-s. 1.
[6] See s. 98.
[7] 20 Hen. 3, c. 4.

or grant leases of or otherwise appropriate the waste or common of the manor.[1] And he may do so equally against the freeholders,[2] as against the copyholders,[3] of the manor. And it is immaterial that the persons entitled to common of pasture are also entitled to some other right of common, such as a right to dig sand, if they complain only of the interruption of the right of common of pasture.[4] He must, however, leave sufficient common for the commoners ;[5] and the onus is upon him to show that he has done so.[6] But the fact, that for such a period as ten years there has been a sufficiency of common, will frequently be *primâ facie* evidence that an actual sufficiency has been left.[7]

Cannot *primâ facie* approve against other commons.

However, the lord of a manor cannot, *primâ facie*, as against common of turbary or estovers, appropriate the mines or quarries, or the earth or gravel in the waste ; such a thing as turf not being annually renewable.[8] And his disability in this respect is irrespective of whether sufficient common for the commoners would be thereby left or not.[9] Such a right would not be authorised by the Statute of Merton, as that only entitles a lord to approve against common of pasture.[10] The disability in question does not, however, exist, unless the land proposed to be approved produces, or is capable of producing, turf or fuel.[11] The lord cannot, *primâ facie*, approve as against a customary right to get stone.[12]

Custom—generally.

There may be a special custom in a manor authorising a lord to approve[13] But even in such a case the lord must,

[1] Lascelles *v.* Onslow, 2 Q. B. D. 449 *et seq.* ; Robinson *v.* Duleep Singh, 11 Ch. D. 831 : see also Williams on Commons, 103 *et seq.* ; Elton on Commons, 175 *et seq.*

[2] Which is the more usual case.

[3] See Williams, 123, citing Shakespear *v.* Peppin, 6 T. R. 741 ; Elton, 209 *et seq.*

[4] Fawcett *v.* Strickland, Com. Rep. 577 ; Shakespear *v.* Peppin, *sup.*

[5] Lascelles *v.* Onslow, 2 Q. B. D. 449 *et seq.* ; Robinson *v.* Duleep Singh, 11 Ch. D. 831.

[6] See Arlett *v.* Ellis, 7 B. & C. 377 ; Betts *v.* Thompson, 6 Ch. 732 ; Hall *v.* Byron, 4 Ch. D. 680 ; Lascelles *v.* Onslow, *sup.* 450 ; Bell *v.* Love, 10 Q. B. D. 559. The onus is upon the commoner where the question arises as to the right of the lord to dig for minerals : *ante*, p. 110.

[7] Lascelles *v.* Onslow, *sup.*

[8] Duberley *v.* Page, 2 T. R. 391 ; Grant *v.* Gunner, 1 Taunt. 435 ; Arlett *v.* Ellis, *sup.* 374 ; Lascelles *v.* Onslow, *sup.* 433, 450.

[9] Lascelles *v.* Onslow, *sup.*

[10] Arlett *v.* Ellis, *sup.* 375 ; A.-G. *v.* Hanmer, 27 L. J. Ch. 841 ; Lascelles *v.* Onslow, *sup.* 451 ; Williams on Commons, 137.

[11] Peardon *v.* Underhill, 16 Q. B. 120.

[12] Heath *v.* Deane, 1905, 2 Ch. at p. 94.

[13] Arlett *v.* Ellis, *sup.* 370, 371 ; Lascelles *v.* Onslow, *sup.* 451.

in exercising his right, leave sufficient common for the commoners ; [1] and leave it in such a state as to make the right of common conveniently exercisable.[2]

Clarkson *v.* Woodhouse.

In an action of trespass against a commoner, it was shown to be a custom for the owners of ancient messuages in a manor to have common of turbary in the waste for necessary fuel ; and for the owner of the waste to assign to the owners of the messuages reasonable parts of the waste to be held in severalty for digging turves for necessary fuel in respect of such messuages ; and for the owners of such messuages to get turves in such reasonable parts, and in no other part of the waste ; and, when and so often as the turves were completely removed from such reasonable parts, for the owner of the waste to inclose them. This was held to be a good custom.[3]

Lascelles *v.* Onslow.

Where a lord in 1751 demised a brick-kiln then standing on a waste, with liberty to inclose a piece of land not exceeding half an acre, and to dig earth for the use of the kiln ; and the lease was renewed from time to time ; and meanwhile leases of other parts of the waste were granted for similar purposes ; and during the currency of the lease of 1751 presentments were made by the homage of encroachments on the waste by strangers ; but no objection was made to the granting of the leases ; and the commoners bought bricks at the kilns ; it was held that there was evidence sufficient to establish that the lord had by custom the right to approve, so that he left sufficiency of turbary and estovers.[4] And such evidence may be available to an equal degree against the freeholders as against the copyholders of a manor ; although the freeholders may have obtained from the lord an express grant of common of turbary and estovers.[5]

Copyholds in waste.

Sand pits or gravel pits in a waste may be copyhold tenements distinct from the waste, and demisable by custom.[6]

Notice of intention to inclose.

Any person intending to inclose a common otherwise than under the provisions to be presently mentioned [7] must give

[1] Arlett *v.* Ellis, *sup.* 370, 371 ; Lascelles *v.* Onslow, *sup.* 451 : cf. Badger *v.* Ford, 3 B. & Al. 155.

[2] Arlett *v.* Ellis, 7 B. & C. 377.

[3] Clarkson *v.* Woodhouse, 5 T. R. 412, n. Its validity appears doubtful ; see *ante*, pp. 130, 131.

[4] Lascelles *v.* Onslow, 2 Q. B. D. 433, 451, 452.

[5] *Ib.* 452, 453.

[6] Doe *v.* Cook, 5 Esp. 221.

[7] See ensuing pages.

three months' notice, by publication in the local papers, to all persons claiming any right in such common.[1]

(β) *Modern Inclosure Acts—Inclosure and Regulation of Commons.*[2]

Protection of existing rights.

Where land has been inclosed, by encroachment or otherwise, from land subject to be inclosed, for more than twenty years, and is not declared allottable, inclosure proceedings cannot prejudice the rights of the Crown or others to such land or the minerals thereunder.[3]

Adjustment of rights.

A provisional order for the regulation of a common may provide for the "adjustment" of the following "rights" in respect of it[4]:—As respects rights of common of turbary in, or taking gravel stone from, or otherwise interfering with the soil of, the common, being waste land of a manor, the determination of the persons to exercise and the mode, places, and times of exercise; and, on compensation being made to any person aggrieved, the restriction, modification, or abolition of such rights. As respects any common, whether waste land of a manor or not, the determination of the rights and obligations of the lord, severalty owners, or other persons entitled to the soil; and, on compensation being made to any person aggrieved, the restriction, modification, or abolition of such rights. And as respects any common, whether waste land of a manor or not, the determination of any rights and settlement of any disputes relating to boundaries, rights in the soil or in the produce of the soil, or otherwise.[5]

Draft provisional order.

Evidence in support of an application for a provisional order must comprise statements as to the mines, minerals, or valuable strata (if any) under the common in question; the questions of boundary (if any) concerning such mines, minerals, or strata; and, where the interest of any lord of the manor in mineral rights may be affected, the compensation agreed on or proposed to be made to him.[6] The Board of Agriculture may then order a local inquiry;[7] and if, as the result, they

[1] 39 & 40 Vict. c. 56, s. 31.
[2] As to the metropolitan commons, see 29 & 30 Vict. c. 122.
[3] 10 & 11 Vict. c. 111, s. 3.
[4] 39 & 40 Vict. c. 56, ss. 2, 3.
[5] S. 4.
[6] S. 10.
[7] Ss. 10—12.

are satisfied that it is expedient to proceed further, must frame a draft provisional order.

Statements and conditions to be inserted.

If the application is for the regulation of a common, the draft must specify whether the provisions for the "adjustment of rights" are to be put in force. And where the interest of any lord of the manor in mineral rights may be affected, there must be inserted a statement of the compensation to be made to him.[1] And there may be inserted, as one of the conditions of the inclosure, any special agreement or matter concerning or affecting the lands to be inclosed.[2] And this provision authorises a condition, that the right to mines and minerals shall be severed from the soil, and that the tenement thus created shall remain in the lord while the soil is allotted to others.[3] There may also be inserted, as one of the conditions of the inclosure, the reservation to the lord of rights of way and other easements over the inclosed lands, for working and carrying away mines or minerals, although not under the inclosed lands, and whether within or not within the manor, and also for working and carrying mines or minerals to be reserved to the lord under the inclosed land.[4] Indeed, where the mines or minerals are reserved to the lord, there must be inserted a statement, whether or not a right to enter for the purpose of working is also to be reserved, and whether or not any compensation is to be made for surface damage.[5] And where there is any mineral property or other rights in relation thereto belonging to persons other than the lord which may be affected, there must be inserted a statement, whether or not a right to enter the land when inclosed for the purpose of working is to be reserved to such other persons, and whether or not any compensation is to be made for surface damage; and there must also be inserted such other provisions and reservations as may appear proper.[6] For the purpose of providing a means of compensation for surface damage, the persons

[1] S. 12: cf. the repealed s. 27 of 8 & 9 Vict. c. 118, and the decision thereon of Musgrave *v.* Incl. Comms., L. R. 9 Q. B. 162.

[2] 11 & 12 Vict. c. 99, s. 1.

[3] Musgrave *v.* Forster, L. R. 6 Q. B. 590.

[4] 14 & 15 Vict. c. 53, s. 9.

[5] See 22 & 23 Vict. c. 43, s. 1. This provision is not affected by 39 & 40 Vict. c. 56, s. 12. As to the meaning of "surface damage," see Allaway *v.* Wagstaff, 4 H. & N. 681, cited *post*, p. 334.

[6] 22 & 23 Vict. c. 43, s. 1; 39 & 40 Vict. c. 56, s. 12.

interested may agree as to the mode in which compensation shall be made; and such agreement, if allowed by the Board, must be stated to the valuer as part of his instructions, and embodied by him in his report and award.[1]

Consents.

Before the draft provisional order can be certified to be expedient, persons representing two-thirds in value of the interests in the common must consent.[2] If, therefore, in any case an interest includes brick earth, the brick earth must be valued. And if the brick earth forms part of the surface, or lies so close to it as in effect to form part of it, it is immaterial that "minerals" may have been expressly excepted from the operation of the inclosure; such brick earth not being a mineral.[3] And where the common is land within a manor to the soil of which the lord is entitled in right of the manor, unless there are more than one person interested, the expediency cannot be certified, unless the person interested consents; and where there are more than one person interested, the expediency cannot be certified in case such persons or the majority of them dissent.[4]

Confirmation.

When the necessary consents have been obtained, the Board must certify that it is expedient that the order should be confirmed by Parliament; and the certificate is then presented to Parliament, and may be confirmed.[5]

Appointment of valuer.

As soon as conveniently may be after the passing of any confirming Act, a valuer is appointed to divide, set out, and allot, or to regulate, the common;[6] and claims are then heard and determined.[7]

His duties and powers—allotments.

The valuer must allot to the surveyor of highways such part of the land proposed to be inclosed as, by the instructions given to the valuer, shall have been directed to be appropriated for supplying stone, gravel, or other materials for the repairs of roads and ways; or, in case no such instructions shall have been given, such part (if any) as the valuer shall think fit.[8] And, after making certain other specified allotments,[9] and

[1] 22 & 23 Vict. c. 43, s. 2: see *infra* and *post*, pp. 178, 179.

[2] 39 & 40 Vict. c. 56, s. 12.

[3] See Church *v.* Incl. Comms., 11 C. B., N. S. 664, a decision under the repealed s. 27 of 8 & 9 Vict. c. 118: see *ante*, pp. 12, 16, 17.

[4] 39 & 40 Vict. c. 56, s. 12.

[5] *Ib.*

[6] 8 & 9 Vict. c. 118, s. 33; 39 & 40 Vict. c. 56, ss. 13, 32.

[7] 8 & 9 Vict. c. 118, ss. 34, 35, 46—48, 55—57, 60.

[8] Ss. 34, 72.

[9] Ss. 73—75.

after making provision for payment of the expenses by sale of land in case the expenses shall be so directed to be paid,[1] he must allot to the lord of the manor so much of the land as he shall consider equal to such part of the residue as shall be proportioned to his right or interest, according to the directions of the provisional order, in lieu of his right in the soil, and exclusive of any other allotments which may be made to him in respect of any other rights.[2] And in case the provisional order declares, that his right has been estimated exclusively of his right in the mines or substrata, the valuer must, on the request of the lord, reserve to the lord such rights and easements for searching for, working, and carrying away such mines or substrata as shall not have been included in such estimate, subject to such provisions for compensation for surface damage as the valuer, with the approval of the Board, may think reasonable.[3] And the residue of the land is allotted to the persons interested, in shares proportionate to the value of their interests as claimed and allowed.[4] And in case the provisional order directs, as one of the conditions of the inclosure, the reservation to the lord of easements over the inclosed land for mining purposes,[5] the valuer must reserve to the lord such liberty to construct railways, waggon ways, and roads, and such rights of way and other easements over the lands to be inclosed for working the mines in question, as the valuer, with the approval of the Board, may think reasonable, and as shall not be inconsistent with the provisional order; subject to such provision for compensation for surface damage as shall be thought reasonable.[6] And in every case in which part of the land is converted into and used as a regulated pasture, and the residue divided and allotted in severalty, the valuer may, having regard to the rights of the lord as ascertained and declared by the provisional order, and with the consent of the lord and a majority in value of the other persons interested,

[1] In Wakefield *v.* Buccleuch (4 Eq. 613), Buccleuch *v.* Wakefield (L. R. 4 H. L. 377), it was made a question whether or not commissioners under an Inclosure Act had power, for the purpose of defraying the expenses of the Act, to sell lands, freed from the lord's right to mines.

[2] S. 76.

[3] *Ib.* As to surface damage, see *ante*, p. 176, n. [5].

[4] S. 77.

[5] See *ante*, p. 176.

[6] 14 & 15 Vict. c. 53, s. 9. As to surface damage, see *ante*, p. 176, n. [5].

direct that the rights of the lord in the mines and substrata under the regulated pasture shall be reserved to the lord, and that the mines and substrata under the residue shall become the property of the owners of the respective allotments, and that the allotments be adjusted accordingly.[1] And, subject to such rights and interests, the property in the soil of regulated pastures vests in the owners of the rights of pasture therein in proportion to their shares as tenants in common.[2]

Report.

After the completion of the allotment or regulation, a report is drawn up; the parties interested are, if necessary, heard; and, subject thereto, the report is approved by the Board.[3]

Award.

The valuer must then, under the direction of the Board, draw up an award and sign it; describing therein the allotments and regulation; and declaring whether all or any and which of the mines and substrata have or have not been included in the estimate of the right of the lord in the soil in respect of which any allotment shall have been made to him; and such award must be confirmed by the Board, and is then binding and conclusive.[4]

Partitions and exchanges.

Partitions and exchanges may be made by the valuer acting under the Inclosure Acts;[5] and the power to effect them extends to lands not subject to be inclosed.[6] And where an exchange is made of lands not subject to be inclosed, or of lands as to which no inclosure proceedings are pending, the Board may except or reserve out of such exchange the property or right to the mines or minerals under the land given by both or either of the parties, together with auxiliary rights and easements, and (whether the mines or minerals shall or shall not be reserved) such rights of way and other easements as the parties may have agreed on.[7]

[1] 8 & 9 Vict. c. 118, s. 97.

[2] S. 116.

[3] Ss. 102, 103; 39 & 40 Vict. c. 56, s. 13.

[4] 8 & 9 Vict. c. 118, ss. 104, 105; 39 & 40 Vict. c. 56, s. 13. In Rowbotham *v.* Wilson (8 H. L. Cas. 361—363, 366), the power of commissioners under an Inclosure Act to separate by their award the mines from the surface was disputed, but upheld.

[5] 8 & 9 Vict. c. 118, ss. 90—92; 20 & 21 Vict. c. 31: see *ante*, p. 177.

[6] 8 & 9 Vict. c. 118, s. 147; 11 & 12 Vict. c. 99, s. 13.

[7] 10 & 11 Vict. c. 111, s. 4.

SECT. 9.—LANDS IN IRELAND.

Land Law (Ireland) Act, 1896.

A "superior interest," as defined in section 31 (8) of the Land Law (Ireland) Act, 1896, includes exceptions or reservations of mines or quarries in conveyances in fee or leases.[1] An exception of mines or quarries is not a superior interest of "no appreciable value" within section 31 (5) merely because they have not been opened, and there is evidence of the improbability of their existence.[2]

Irish Land Act, 1903.

Section 13 (3) of the Irish Land Act, 1903, provides, that, on the sale under the Land Purchase Acts of any land by the Land Commission, or of any land comprised in an estate by the owner of the estate, there shall be reserved to, and disposed of by, the Commission the exclusive right of mining and taking minerals and digging and searching for minerals on or under that land. But the sub-section does not apply—(a) to any demesne or other land resold under section 3; or (b) to any such right which constitutes a "superior interest," or which is vested in the Crown; or (c) to any stone, gravel, sand, or clay. And when any such right reserved to the Commission is afterwards let, leased, sold, or demised, the vendor (or the person who would have been entitled if the lands had not been sold) is entitled to 25 per cent. of the net profit received by the Commission, unless the Commission shall have purchased his interest therein. And section 13 (4) provides that, where any right is so reserved, there shall be attached thereto a right of entry, subject to making compensation for damage. Nothing in the Act affects any mineral rights which are not in the possession or enjoyment of the vendor at the time of sale; or any mine or quarry which is being worked or developed by the vendor at the time of sale.[3]

[1] Herbert's Estate, 1897, 1 I. R. 476.

[2] O'Brien's Estate, 34 I. L. T. R. 95.

[3] S. 99.

CHAPTER VIII.

POWERS WITH RESPECT TO LEASES AND LICENCES.

Sect. 1.—TENANT IN FEE.

Infant.

Where an infant is entitled to lands in fee simple, or in tail, and it appears to the Court to be for his benefit that a lease thereof should be made for the working of mines, the infant or his guardian in his name may by the direction of the Court, under the Act 1 Will. 4, c. 65, s. 17, make such lease for such term or terms of years, and subject to such rents and covenants, as the Court shall direct. And the lease may be made of new as well as of open mines.[1] And the authority of the Court extends to cases where the infant is entitled in possession subject to an executory devise over, if the devisee consents ;[2] or is entitled in remainder, subject to a tenancy by the curtesy, if the tenant consents ;[3] or is entitled merely as a co-owner with other persons.[4] Leases of mines or quarries of an infant may also be made under the Settled Estates Act, 1877,[5] as extended by section 41 of the Conv. Act, 1881.[6] And where one-sixth of an estate containing coal was settled, and the other five-sixths were vested in infants in fee, a lease was approved under the joint authority of the Act 1 Will. 4,

[1] There is no restriction in the authority given to the Court. As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[2] *Re* Clark, 1 Ch. 292 : cf. *Re* Letchford, 2 Ch. D. 719 ; and see 44 & 45 Vict. c. 41, s. 41.

[3] Spencer's Trusts, 37 L. J. Ch. 18.

[4] See Bentley *v.* Landor, Set. 1032, where the form of the order is given.

[5] 40 & 41 Vict. c. 18. See ss. 25, 49 : see Boyd's Settled Estate, 8 Ir. Rep. Eq. 76 (a decision under the repealed Act 19 & 20 Vict. c. 120). For the form of the order, see pp. 77, 78.

[6] 44 & 45 Vict. c. 41. "Rent" under the Act includes yearly or other rent, toll, duty, royalty, or other reservation by the acre, the ton, or otherwise. And a "mining lease" under the Act is a lease for mining purposes ; that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of, mines and minerals, or purposes connected therewith ; and includes a grant or licence for mining purposes : s. 2, sub-ss. 9, 11 ; cf. the definitions in the Settled Land Act, *post*, pp. 186, 187, and the Finance 1909–10) Act, 1910, *post*, pp. 570, 571.

c. 65, s. 17, and the Settled Estates Act, 1877.[1] Resort may also be had to the Settled Land Act, 1882.[2]

Lunatic.

The committee of a lunatic entitled in fee simple, or in tail, may, under the authority of the Court, grant leases of minerals forming part of the lunatic's property, whether already worked or not,[3] and either with or without the surface or other land; and may accept surrenders of leases and grant new leases.[4] Leases so authorised to be granted may be for such terms of years, at such rent and royalties, and subject to such reservations, covenants, and conditions as the Court approves.[5] Moneys received under any lease of unopened mines and all fines, premiums, and sums of money received on the grant or renewal of a lease where the property the subject of the lease was real estate of the lunatic, are, subject to the application thereof for any purposes authorised by the Lun. Act, 1890, as between the representatives of the real and personal estate of the lunatic, considered as real estate.[6]

Sect. 2.—TENANT FOR LIFE.

(a) *Generally.*

Open mines.

A tenant for life, even if impeachable of waste, may grant a lease of open[7] mines or quarries for a fixed term of years, "if he shall so long live," under his mere common law power. And, as a power to lease "lands" includes a power to lease all mines or quarries within or under them,[8] he may grant a lease of open mines or quarries for twenty-one years under the ordinary power in a settlement to grant leases for twenty-one

[1] See *Re* Edwards, Set. 1799. The Court would not, under the Act 1 Will. 4, c. 65, s. 17, have authorised the grant of a lease of mines, in which an infant was only entitled in remainder; however beneficial such a lease might have been: Wood *v.* Patteson, 10 Beav. 541. Such a lease may, however, be granted under the Settled Estates Act, 1877: see *post*, p. 184, n. [7].

[2] Ss. 59, 60.

[3] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[4] Lun. Act, 1890, ss. 120, 122: see as to Ireland 34 & 35 Vict. c. 22, ss. 79—82.

[5] Lun. Act, 1890, s. 122.

[6] S. 123. See as to Ireland 34 & 35 Vict. c. 22, s. 82. Under the Lun. Reg. Act, 1853, the Court would not have allowed a premium or fine to be taken; and, if a premium or fine had been taken upon a lease purporting to have been under the order of the Court, would have treated the lease as a sale: see *Re* Smith, 10 Ch. 79, cited *ante*, p. 148.

[7] As to open and new mines, see *ante*, pp. 55 *et seq.*

[8] Campbell *v.* Leach, Amb. 747; Clegg *v.* Rowland, 2 Eq. 165, 166.

years; and none the less because the ordinary power provides that the lessee is not to be made dispunishable for waste. And in either case he may appropriate the whole of the rents.[1]

New mines.

A tenant for life without impeachment of waste may grant a lease of new[2] mines or quarries for a fixed term of years, "if he shall so long live," and appropriate the whole of the rents. And although it may be that he cannot grant a lease of them for twenty-one years under the ordinary power in a settlement to grant leases for twenty-one years, he may acquire power to do so by the mere operation of converting them into open mines or quarries. For, as soon as they are open mines or quarries, his powers with respect to them must be at least equal to those of a tenant for life impeachable of waste.[3] A tenant for life impeachable of waste cannot, however, grant a lease of new mines or quarries under the ordinary power in a settlement to grant leases for twenty-one years.[4] But if a tenant for life impeachable of waste leases new[2] mines, he will not, although the lease be improper, be allowed to restrain the lessee from working; as he cannot be permitted to disaffirm his own lease.[5] And on similar principles an agreement by a tenant for life impeachable of waste to grant a lease of new[2] mines may, to the extent of his interest, be specifically enforced against him.[6]

Fine on surrender.

Where a legal tenant for life grants a lease under a power; and the lessee is entitled to determine at fixed intervals, on the terms of paying the dead rent for the whole residue of the term; and the lease is determined accordingly; the rent is not in the nature of capital money, but belongs to the tenant for life absolutely.[7]

(β) *Settled Estates Act*, 1877.[8]

S. 46.

A tenant for life, even if impeachable of waste, may grant a lease of open[9] mines or quarries for twenty-one years under

[1] Campbell *v.* Leach, Amb. 740; Clegg *v.* Rowland, 2 Eq. 160.

[2] As to open and new mines, see *ante*, pp. 55 *et seq.*

[3] See *sup.* As to the power of a tenant for life without impeachment of waste to work new mines or quarries, see *ante*, p. 94.

[4] See Clegg *v.* Rowland, 2 Eq. 165.

[5] Wentworth *v.* Turner, 3 Ves. 3.

[6] See Cleaton *v.* Gower, Finch, 164.

[7] Hunloke's Settled Estates, 1902, 1 Ch. 941. Cf. *Re* Rodes, 1909, 1 Ch. 815, cited *post*, p. 193.

[8] 40 & 41 Vict. c. 18.

[9] As to open and new mines, see *ante*, pp. 55 *et seq.*

section 46 of the Settled Estates Act, 1877; and appropriate the whole of the rents.[1] And a tenant for life without impeachment of waste can acquire and exercise a similar power with respect to new mines or quarries by merely converting them into open ones.[2] If, therefore, a lease for a longer term is not desired, every tenant for life of open mines, or a tenant for life without impeachment of waste of new mines may, if he pleases, proceed under section 46 of this Act, instead of under section 4 [3] of this Act, or section 6 [4] of the Settled Land Act, 1882; and so avoid the obligation to capitalise a part of the rents.[5]

S. 4.

Under section 4 of the Settled Estates Act, 1877, the Court may authorise the grant of mining leases; or leases of way-leaves, waterleaves, or other rights or easements over or affecting any settled estates; whether involving waste or not; for terms of years not exceeding forty years. And any such lease may be for such term of years as the Court may direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such lease for a longer term than forty years. And, as the lease may be made whether it involves waste or not, it may be made of new as well as of open [6] mines.[7]

Necessary to comply with statutory requirements.

But every such lease must be made to take effect in possession at or within one year next after the making thereof. And in every such lease must be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine. But a peppercorn rent or any smaller rent than the

[1] S. 46 is in substance the same as the ordinary power in a settlement to grant leases for twenty-one years. Campbell *v.* Leach, Amb. 740 (cited *ante*, p. 182), is therefore an authority for the proposition in the text. It is submitted that the dictum to the contrary in Davies *v.* Davies, 38 Ch. D. 501, cannot be supported.

[2] See, as to the ordinary power in a settlement, *ante*, pp. 182, 183.

[3] *Infra*, in this page.

[4] *Post*, p. 187.

[5] Consider Newcastle's Estates, 24 Ch. D. 138.

[6] As to open and new mines, see *ante*, pp. 55 *et seq.*

[7] Leave to grant leases is obtainable at the instance of the same persons as in the case of sales (*ante*, p. 149, n. [3]): s. 23. There is nothing in the Act to prevent the grant of a lease of mines to which an infant is entitled in remainder. The Court had no such power under 1 Will. 4, c. 65: see Wood *v.* Patteson, 10 Beav. 541; see 44 & 45 Vict. c. 41, s. 41.

rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease.[1] And every such lease must be by deed; and the lessee must execute a counterpart; and the lease must contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf. And every such lease must contain such other covenants and conditions as the Court shall deem expedient.[2] As an illustration of such other covenants and conditions, the Court in approving of an agreement for a lease of land, with liberty to dig and get brick earth, has required the lessee to bind himself not to occasion a nuisance to neighbouring owners, and to indemnify the lessors against proceedings in respect of any nuisance.[3]

Incidental powers.

Parts of estates authorised to be leased under section 4 may be leased as well as the whole. And the power to authorise leases may be exercised from time to time.[4] And leases may be surrendered and renewed.[5] And the power to authorise leases extends to preliminary contracts.[6] And the power may be exercised either by approving of particular leases, or, with the consent of all parties, by vesting general leasing powers in trustees.[7] And where one-sixth of an estate containing coal was settled, and the other five-sixths were vested in infants in fee, a lease was approved under the joint authority of the Settled Estates Act, 1877, and the Act 1 Will. 4, c. 65, s. 17.[8] As incident to the power to grant a mining lease conferred by the Act, power will be granted to lease so much land as may be necessary for the convenient and effective

[1] It seems doubtful whether the Act authorises a lease reserving a render in kind: see Dav. 4, p. 415, n. Cf. the definition of rent in the Settled Land Act, 1882, *post*, p. 186.

[2] S. 5. For an order approving of agreements for mining leases, with directions as to their settlement by the judge, and as to the application of the rents, see Bolton Estes., Set. 1798.

[3] See Wheeler *v.* Tootel, Set. 1798.

[4] S. 6.

[5] S. 7.

[6] S. 8.

[7] Ss. 10—13: see *Re* Green, 10 Jur. N. S. qu.; *Re* Dorning, 14 W. R. 125; Hutchinson's Trusts, 14 W. R. 473; Tolson *v.* Sheard, 5 Ch. D. 19: see Set. 1793—1796 for form of an order vesting powers.

[8] See *Re* Edwards, Set. 1799. As to the latter Act, see *ante*, pp. 181, 182. For the form of the order which will be made, see Set. 1795, 1796.

working of the minerals ; [1] and power may be granted to create wayleaves over any part of the settled estates.[2]

Application of rents.

Where the Court authorises a lease of any "earth, stone, coal, or mineral," under section 4, one-fourth part or three-fourth parts of the rent or payment reserved, according as the person for the time being entitled to the receipt of the rent is or is not, by reason of his estate or of any declaration in the settlement in question, entitled to work such earth, stone, coal, or mineral, for his own benefit, must be from time to time set aside ; [3] and the moneys so set aside must be paid and applied in the same way [4] as moneys to be received on any sale effected under the authority of the Act.[5] And in every lease sufficient provision must be made to ensure such application by the appointment of trustees or otherwise as the Court may deem expedient.[6] Salt obtained by the evaporation of brine-water pumped up from a depth of 150 feet is not "earth, stone, coal, or mineral," so as to come within these provisions.[7] Moneys set aside and in the hands of trustees for investment in the purchase of other lands will pass with the surface, and not with the mines of which the lease had been granted, where the surface and the mines have, under a power of appointment, of which the tenant for life of both was the donee, been separately devised.[8]

(γ) *Settled Land Acts.*[9]

Meanings of "rent" and "mining lease."

In the Settled Land Act, 1882, "rent includes yearly or "other rent, and toll, duty, royalty, or other reservation, "by the acre, or the ton, or otherwise ; and, in relation to rent, "payment includes delivery." "And a mining lease is a

[1] Reveley's Settled Estes., 11 W. R. 744.

[2] Wallace's Settled Estes., W. N. 1869, p. 66.

[3] S. 4 : cf. the corresponding provision of the Settled Land Act, *post*, pp. 190, 191.

[4] Ss. 34—36.

[5] See *ante*, p. 152. An order made under the repealed Act 19 & 20 Vict. c. 120 having been amended under the repealed Act 27 & 28 Vict. c. 45 by striking out a condition as to settling a lease in chambers, the costs of the application were directed to be paid out of the one-fourth part of the rents set aside : Lovat *v.* Leeds, 11 L. T., N. S. 442.

[6] S. 4. For the form of the order, see Set. 1796.

[7] See Dudley's Settled Estates, 26 S. J. 359, cited in Clerke's Settled Land Act, p. 62.

[8] *Re* Scarth, 10 Ch. D. 499, decided under s. 23 of the repealed Act 19 & 20 Vict. c. 120.

[9] 1882, 1884, 1887, 1889, and 1890.

"lease for any mining purposes or purposes connected there-
"with, and includes a grant or licence for any mining pur-
"poses."[1] The meanings of "mines and minerals" and "mining purposes" have been already stated.[2]

General power to lease mines, whether new or open.

Section 6 of the Act of 1882 provides, that "a tenant for "life may lease the settled land, or any part thereof, or any "easement, right, or privilege of any kind, over or in relation "to the same, for any purpose whatever, whether involving "waste or not, for any term not exceeding—

"(i) In case of a building lease, ninety-nine years:

"(ii) In case of a mining lease, sixty years:

"(iii) In case of any other lease, twenty-one years."

And as the lease may be made, whether it involves waste or not, it may be made of new as well as of open mines.[3] Section 7 provides, that the lease must be by deed, and be made to take effect in possession not later than twelve months after its date; and must reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and generally to the circumstances; and must contain a covenant by the lessee for payment, and a condition of re-entry on non-payment within a time specified not exceeding thirty days; and a counterpart must be executed by the lessee.

Power to authorise removal of support.

These provisions empower a tenant for life to authorise the lessee to let down the surface. No distinction can for this purpose be made between an authority to damage the surface by opening a pit in it, or making a railway across it, and an authority to damage it by disturbing it from below.[4]

Power to except mines.

And they empower him to grant a lease, with an exception of the mines and minerals.[5]

Rent and royalties—Act of 1882.

Section 9 of the Act provides, that—

"(1) In a mining lease—

"(i) The rent may be made to be ascertainable by or to vary "according to the acreage worked, or by or according to "the quantities of any mineral or substance gotten, made

[1] S. 2: cf. the definitions in the Conv. Act, 1881, *ante*, p. 181, n. [6], and the Finance (1909–10) Act, 1910, *post*, p. 570.

[2] *Ante*, p. 150.

[3] As to open and new mines, see *ante*, pp. 55 *et seq.*

[4] Sitwell *v.* Londesborough, 1905, 1 Ch. 460.

[5] *Re* Gladstone, 1900, 2 Ch. 101; overruling *Re* Newell and Nevill's Contract, 1900, 1 Ch. 90: see also Rutland's Settled Estates, 1900, 2 Ch. 206.

"merchantable, converted, carried away, or disposed of, in or "from the settled land, or any other land, or by or according "to any facilities given in that behalf; and

"(ii) A fixed or minimum rent may be made payable, with "or without power for the lessee, in case the rent, according "to acreage or quantity, in any specified period does not "produce an amount equal to the fixed or minimum rent, to "make up the deficiency in any subsequent specified period, "free of rent other than the fixed or minimum rent.[1]

"(2) A lease may be made partly in consideration of the "lessee having executed, or his agreeing to execute, on the "land leased, an improvement authorised by this Act,[2] for "or in connection with mining purposes."

Act of 1890.

And section 8 of the Act of 1890 provides, that—

"In a mining lease—

"(i) The rent may be made to vary according to the price "of the minerals or substances gotten, or any of them:

"(ii) Such price may be the saleable value, or the price "or value appearing in any trade or market or other price list "or return from time to time, or may be the marketable value "as ascertained in any manner prescribed by the lease (in- "cluding a reference to arbitration), or may be an average "of any such prices or values taken during a specified period."[3]

Minimum rent on ascending scale—cesser —wayleave after cesser.

Where it is shown, that such a mode of dealing is usual in the district, and is the best that can be made for the development of the estate, an acreage rent may be reserved, with a minimum rent commencing in the second year of the term, and increasing year by year during the early part of the term.[4] No doubt in the case of a surface lease the reservation of an uniform rent would be necessary.[5] But there is little analogy between a mining lease and a surface lease; the former being in substance a sale at a price payable by instalments.[6] There

[1] As to an average clause, see *post*, pp. 243, 244.

[2] *Ante*, pp. 152, 153.

[3] It is doubtful whether, before the Act of 1890, a rent varying according to the price of the minerals was authorised: see Lonsdale *v.* Lowther, 1900, 2 Ch. at p. 696.

[4] Aldam's Settled Estate, 1902, 2 Ch. 46.

[5] See Doe *v.* Harvey, 1 B. & C. 426.

[6] See Attersoll *v.* Stevens, 1 Taunt. 201, *per* Lord Mansfield; Jegon *v.* Vivian, L. R. 1 C. P. 34, *per* Erle, C.J.; Eadon *v.* Jeffcock, L. R. 7 Exch. 394, *per* Bramwell, B.; Vivian *v.* Jegon, L. R. 3 H. L. 290; Gowan *v.* Christie, L. R. 2 Sc. & Div. 284, *per* Lord Cairns; Coltness Co. *v.* Black, 6 A. C. 335, *per* Lord Blackburn; Pountney

is, moreover, little analogy between the provisions of the Settled Land Acts and those of the Settled Estates Act, 1877. The reservation of a peppercorn rent during the first five years is, no doubt, expressly authorised in the latter Act,[1] and is not in the former. But the general intention and scope of the former Acts are wider than those of the latter.[2] Provision may also, where it is shown to be usual and beneficial, be made for the cesser of the minimum rent when all the demised minerals have been paid for at the acreage rent.[3] And in the like event the lease may contain a grant of a wayleave for foreign minerals to continue during the whole term, and subject to the payment of a nominal rent after the cesser of the minimum rent.[4]

Minimum rent on descending scale.

The reservation of a minimum rent on a descending scale would probably be ineffective as between the tenant for life and the remainderman.[5] A reservation of the latter kind would not, however, avoid the lease. It would, in substance, include a fine ; and, so far as it was a fine, would be applicable as capital money.[6] In *Re* Lowther's Estates,[7] it was proposed to grant a lease reserving royalties, and a dead rent varying from 8,000*l.* a year to 1,000*l.* a year. It was declared (1) that, when the royalties equalled or exceeded the dead rent, the tenant for life would be entitled to the royalties ; (2) that, when the royalties were less than the dead rent, but produced 1,000*l.* a year or more, he would be entitled to the royalties, but the difference between the royalties and the dead rent would be capital money ; and (3) that, when the royalties were

v. Clayton, 11 Q. B. D. 832, 833, *per* Brett, M.R. ; Campbell *v.* Wardlaw, 8 A. C. 649, *per* Lord Watson ; *Re* Willis, 21 Q. B. D. 388, *per* Cave, J. Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 327, *per* Smith, J. ; Farrar *v.* Farrars, Lim., 40 Ch. D. 398, *per* Chitty, J. ; Aldam's Settled Estate, *sup.* 56, *per* Collins, M.R., 58, *per* Stirling, L.J., 63, 64, *per* Hardy, L.J. : see also Smith *v.* G. W. R. Co., 3 A. C. 178—180, 185, 186, 191 ; Munro *v.* Didcott, 1911, A. C. 148, 149.

[1] See *ante*, pp. 184, 185.

[2] See Aldam's Settled Estate, 1902, 2 Ch. 56, *per* Collins, M.R., 58, *per* Stirling, L.J., 62, 64, *per* Hardy, L.J. Even if it had been unlawful to grant a lease at an ascending minimum rent, it would not have been unlawful to take a covenant from the lessee to work in increasing quantities, which would practically have had the same result : Aldam's Settled Estate, *sup.* 51, 52, *per* Stirling, L.J.

[3] Aldam's Settled Estate, 1902, 2 Ch. 46.

[4] *Ib.*

[5] *Ib.* 63, 64, *per* Hardy, L.J.

[6] See s. 7 (2) of Act of 1882 ; s. 4 of Act of 1884.

[7] Stirling, J., May 9th, 1894.

less than the dead rent, and would not produce 1,000*l.* a year, he would be entitled to 1,000*l.* a year.

Variation according to circumstances of district.

Section 10 of the Act of 1882 provides, that—

"(1) Where it is shown to the Court with respect to the "district in which any settled land is situate, either—

"(i) That it is the custom for land therein to be leased or "granted for . . . mining purposes for a longer term or on "other conditions than the term or conditions specified in "that behalf in this Act, or in perpetuity; or

"(ii) That it is difficult to make leases or grants for . . . "mining purposes of land therein, except for a longer term or "on other conditions than the term or conditions specified in "that behalf in this Act, or except in perpetuity; the Court "may, if it thinks fit, authorise generally the tenant for life "to make from time to time leases or grants of or affecting "the settled land in that district, or parts thereof, for any "term or in perpetuity, at fee farm or other rents, secured by "condition of re-entry, or otherwise, as in the order of the Court "expressed, or may, if it thinks fit, authorise the tenant for "life to make any such lease or grant in any particular case.

"(2) Thereupon the tenant for life, and, subject to any "direction in the order of the Court to the contrary, each "of his successors in title being a tenant for life, or having "the powers of a tenant for life under this Act, may make "in any case, or in the particular case, a lease or grant of or "affecting the settled land, or part thereof, in conformity with "the order." [1]

Application of rents.

Section 11 of the same Act provides, that "Under a mining "lease, whether the mines or minerals leased are already opened "or in work or not,[2] unless a contrary intention is expressed "in the settlement, there shall be from time to time set aside, "as capital money arising under this Act, part of the rent as

[1] See *Re* Powell, W. N. 1884, p. 67. Cf. the corresponding provision of the Settled Estates Act, *ante*, pp. 183, 184. Where, under the Settled Land Act, the Court gives a general authority, the order must not, unless for some special reason, direct any particular lease to be settled or approved by the judge; and where the Court gives a particular authority, the order may either approve a lease already prepared, or direct that the lease shall contain specified conditions, or such conditions as may be approved at chambers without directing the lease to be settled by the judge: Settled Land Act Rules, 1882, r. 9.

[2] As to open and new mines, see *ante*, pp. 55 *et seq.*

"follows, namely,—where the tenant for life is impeachable "for waste in respect of minerals, three fourth parts of the rent, "and otherwise one fourth part thereof, and in every such case "the residue of the rent shall go as rents and profits."

Contrary intention.

Where an infant tenant in tail was entitled in possession; and the settlement empowered the trustees of a term to apply the net rents for maintenance of the mansion house, and for rebuilding, repairing, and improving, and for insurance; and to invest and accumulate the surplus, and apply it in paying off charges, or in purchasing real estate, employing agents, and holding courts: it was held, that a "contrary intention" against the tenant for life was expressed; and that the whole of the rents were payable to the trustees to be applied according to the settlement.[1] On the other hand, where lands were held by trustees upon trust for sale and investment, with a power to postpone; and upon trust to pay the income of the investments, or the "rents and profits" until sale, to a lady for her life; and the trustees had power to open and work mines, and to grant mining leases; and the trustees postponed the sale; it was held, that a "contrary intention" in favour of the tenant for life was expressed; and that, in the event of her granting a mining lease under section 63 of the Act of 1882, no part of the rent was liable to be set aside.[2] The latter case does not seem to have been very seriously argued; but, if it was correctly decided, there are few settlements in which a "contrary intention" in favour of the tenant for life is not expressed.[3]

Meaning of the section.

The obscurity of the words "impeachable for waste in respect of minerals" suggested the following questions:—Is it necessary, that, to bring a tenant for life within the section, he should be expressly made unimpeachable for waste? Or is he within the section in every case where the minerals are open,[4] although he is not expressly made unimpeachable? And if the latter construction is right, what effect is given to the words, "whether the minerals leased are already opened or in

[1] Newcastle's Estates, 24 Ch. D. 129.

[2] See *Re* Bagot's Settlement, 1894, 1 Ch. 177: see p. 178; and see the minutes at pp. 184, 185.

[3] Cf. Lonsdale *v.* Lowther, 1900, 2 Ch. 687.

[4] As to open and new mines, see *ante*, pp. 55 *et seq.*

work or not " ? These questions were answered in *Re Chaytor*,[1] where it was held, that it was not necessary that a tenant for life should be expressly made unimpeachable.

Application of section to land subject to trust for sale.

Section 11 does not apply exclusively to the case of a tenant for life of land containing mines. Section 63 provides, that, where land is subject to a trust for sale, or for the application of the proceeds, or of the income of the proceeds, or of the land until sale, for the benefit of any person for his life, the land " shall be deemed to be " settled land, and such person " shall be deemed to be " the tenant for life. And, although the words " impeachable for waste in respect of minerals " in section 11 are not strictly appropriate to the case of a person so deemed to be the tenant for life, he is nevertheless in the position of a tenant for life impeachable for waste in respect of minerals. If, therefore, he grants a lease of new mines under the Act, three-fourths of the rents must be set aside as capital moneys.[2]

No obligation to capitalise when recourse had to other powers.

It has been already seen, that a tenant for life of open mines, or a tenant for life without impeachment of waste of new mines, may, if he pleases, proceed under section 46 of the Settled Estates Act, 1877.[3] If, therefore, a lease for a longer term than twenty-one years is not desired, such a tenant for life may, by so doing, avoid the obligation to capitalise a part of the rents. It will be noticed, that section 6 of the Settled Land Act, 1882, enables a tenant for life to demise for twenty-one years. But the latter power does not apply to the case of a mining lease ; as the section previously provides specifically for the cases of building leases and mining leases, and gives power to demise for twenty-one years only in the case of " any other lease."

Lease in exercise of " every power."

Where a tenant for life has power to lease mines under a settlement as well as under the Settled Land Acts ; and the settlement is prior to the Acts in point of time ; and the donee leases in exercise of " every power ; " no capitalisation is required. The reason is ; either that, the power under the settlement being prior in time, its exercise leaves nothing on which the powers of the Acts can operate ; or that the donee would be presumed to have exercised the power under the

[1] 1900, 2 Ch. 804.

[2] *Re* Ridge, 31 Ch. D. 504, *per* Lord Halsbury and Lindley and Fry, L.JJ., reversing Bacon, V.-C.

[3] *Ante*, pp. 183, 184.

settlement, as being the more beneficial to himself personally.[1] In such a case the above reasons point in the same direction. What the result would be, where the settlement is subsequent in time, and where they accordingly point in opposite directions, has not been decided.[2]

Lease for effectuating contract by predecessor, &c.

Section 12 of the Act of 1882 provides, that the leasing power of a tenant for life extends to making a lease for giving effect to a contract entered into by a predecessor in title, or for giving effect to a covenant for renewal, or for confirming a previous lease being void or voidable.

Cases within s. 12 may be outside s. 11.

A lease made for giving effect to a contract entered into by a predecessor may be free from the obligation to capitalise a part of the rents.[3]

Surrenders.

Section 13 of the same Act provides, that a tenant for life may accept, with or without consideration, a surrender of any lease, in respect of the whole land leased, or any part of it, with or without an exception of all or any of the "mines and minerals," or in respect of "mines and minerals," or any of them; and on a surrender in respect of part only of the land or "mines and minerals," the rent may be apportioned. And the tenant for life may make a new or other lease, or new or other leases in lots, of the surrendered land or "mines and minerals" or any part thereof; and such new or other lease may comprise additional land or "mines and minerals," and may reserve any apportioned or other rent. Money paid to tenant for life by a lessee as consideration for accepting a surrender of a lease, which has been granted by the tenant for life under the powers of the Settled Land Acts, does not belong to him as a casual profit, but must be paid by instalments to him and other persons entitled by way of succession.[4] The position differs from that in *re* Hunloke's Settled Estates.[5]

Separate dealing with surface and minerals.

Section 17, under which the surface and minerals may be separately dealt with, has been already stated.[6]

[1] Lonsdale *v.* Lowther, 1900, 2 Ch. 687.

[2] As to the effect of s. 56 of the Act of 1882, see *post*, p. 194.

[3] *Re* Kemeys-Tynte, 1892, 2 Ch. 214, 215. The corresponding provision with regard to conveyances contained in s. 6 of the Settled Land Act, 1890, does not apply to leases: *Re* Kemeys-Tynte, *sup.* 213. As to capitalisation, see *ante*, pp. 190–192.

[4] *Re* Rodes, 1909, 1 Ch. 815: see Lacon's Settlement, 1911, 2 Ch. at 23.

[5] 1900, 2 Ch. 687, cited *ante*, p. 183.

[6] *Ante*, p. 151.

Deeds and contracts.

A tenant for life has corresponding powers of executing deeds,[1] and of entering into preliminary contracts.[2]

Where other powers available.

Section 56 of the Act of 1882, providing for the case of other powers being available than those of the Act, and for the case of conflict between them, has been already stated.[3] Section 56 cannot be invoked to compel a tenant for life to capitalise under section 11. Its provisions are provisions connected with the execution of the power, and not with the results of such execution.[4]

Where Act and settlement in conflict.

Where a settlement gave power to the guardians to grant leases during minority, it was held, that the power was exercisable by the guardians with the consent of the trustees.[5]

Sect. 3.—TRUSTEES.

(*a*) *Generally.*

May not *primâ facie* lease.

Trustees, as such, have no power to grant a mining lease on the mere ground that it is beneficial for the parties interested; such a lease operating *pro tanto* as an abstraction of the inheritance. And it is immaterial, that they may have been directed to pay the rents of the property in question to a tenant for life. And, independently of statute, they cannot obtain the requisite power from the Court.[6] And a trust to sell mines or quarries does not authorise leases to be granted.[7] Where, however, there was a trust for sale, and a direction that until sale the trustees should cause the real estate to be kept "in good and tenantable order and repair;" and the property included a brickfield subject to a lease; it was held that the trustees had an implied power upon the expiration of the lease to let the brickfield from year to year.[8]

May obtain power under Settled Estates Act.

Trustees may, however, obtain power to grant a mining lease under the Settled Estates Act, 1877. They are persons "entitled to the possession or to the receipt of rents and

[1] S. 20 of Act of 1882.

[2] S. 31.

[3] *Ante*, p. 154.

[4] Lonsdale *v.* Lowther, 1900, 2 Ch. 687.

[5] Newcastle's Estates, 24 Ch. D. 129. As to procedure, see Settled Land Act Rules, 1882. Questions as to the position of a tenant for life under an express power are discussed, *post*, pp. 196 *et seq.*

[6] Wood *v.* Patteson, 10 Beav. 541.

[7] See Jervoise *v.* Clarke, 6 Madd. 96.

[8] Garton *v.* Cumberland, 1909, 1 Ch. 625.

profits" within section 23.[1] Indeed, where a will vests lands in trustees, upon trust out of the income to pay an annuity, and to accumulate the residue for twenty-one years if the annuity so long continues; and, subject to this, it settles the lands; and it contains no power to grant mining leases; it is impossible to grant a mining lease except by utilising section 23. For there is not, during the continuance of the annuity, a tenant for life who can utilise the provisions of the Settled Land Acts.[2]

Lease of two estates.

Where two contiguous mining estates belong to trustees upon trust for distinct beneficiaries, and the trustees obtain power to grant mining leases under the Settled Estates Act, an agreement by them to grant one lease of both estates, reserving the rents and royalties as if there were only one estate, and enabling the minerals to be worked by means of a shaft on one of the estates, is *ultra vires*.[3] And whether an agreement by trustees to grant one lease of two estates can, under any circumstances, be *intra vires*, is questionable.[4]

Undivided share.

Trustees of an undivided share in mines, with a power to let and manage, and to join with other persons in letting and managing, may join with the other co-owners in demising the entirety of the mines already opened.[5]

(β) *Express Powers—Construction.*

Express powers.

Where a settlement contains an express power of leasing mines or quarries, the power is generally given to the tenant for life, if *sui juris*. And the analogy of the Settled Land Act, 1882,[6] lends, to say the least, considerable countenance to the practice. However, having regard to the fact, that a lease of mineral property is in very few respects different in substance from a sale,[7] it would seem to be the more correct practice to give the power of leasing, as a power of sale is given,[8] to the trustees;[9] arming them, if necessary, with the incidental power to revoke existing, and to appoint new,

[1] *Re* Puxley, Ir. Rep. 2 Eq. 237; *Re* Chapman, October 28th, 1902, *per* Eady, J.: see *ante*, pp. 149, n. [3], 184, n. [7].

[2] *Re* Puxley, *sup.*; *Re* Chapman, *sup.*

[3] Tolson *v.* Sheard, 5 Ch. D. 19.

[4] *Ib.*

[5] *Re* Baskerville, 1910, 2 Ch. 329.

[6] *Ante*, pp. 186 *et seq.*

[7] See *ante*, p. 188.

[8] *Ante*, pp. 156, 157.

[9] See Vivian *v.* Jegon, L. R. 3 H. L. 290, *per* Lord Cairns.

uses.[1] Questions as to the position of a tenant for life, and of trustees, under express powers will be conveniently considered together.

Construction —"usual powers"—"same powers."

A direction in marriage articles, that a settlement shall contain "all usual powers," will probably, if the articles include mines, authorise the insertion of a power to lease them.[2] And, where a settlement of personal property contained a covenant to settle all future acquired property on the same trusts, and subject to the same powers, or as near thereto as the nature and tenure of the property would admit of; and mines which had never been effectually worked, but of which the prior owner had granted leases, were subsequently acquired; the insertion of a power to grant leases of such mines was held authorised.[3]

General power not mentioning mines.

When trustees had power to lease "any portion of my . . . estates for any number of years and subject to such provisions, conditions, and stipulations as they shall in their . . . discretion think proper and beneficial," it was held that they might demise new mines.[4]

General power mentioning mines.

Where an estate, "with the mines, minerals, and quarries" thereunder, was settled; and power was given to the trustees of the settlement to demise "all or any part" of the "said hereditaments, lands, and other premises," so as none of the lessees "be made dispunishable of waste;" it was held, that the trustees might not grant leases of the new, but only of the open [5] mines.[6] However, where an estate, "with the mines and minerals," was settled; and power was given to the trustees to demise the "said hereditaments and premises, or any part thereof," and the "coal, minerals, and stone within or under the same, together with or separately therefrom, with the appurtenances;" it was held, that this authorised a lease of the coal and minerals situated under any part whatever of the premises; and that the power was not, therefore,

[1] As to the effect of the Settled Land Acts upon the powers created by a settlement, see *ante*, pp. 154, 194.

[2] Hill *v.* Hill, 6 Sim. 145.

[3] Scott *v.* Steward, 27 Beav. 367.

[4] Wallis *v.* Barker, 88 L. T. 685. As to open and new mines, see *ante*, pp. 55 *et seq.*

[5] As to open and new mines, see *ante*, pp. 55 *et seq.*

[6] Clegg *v.* Rowland, 2 Eq. 165, 166, and see *Re* Baskerville, 1910, 2 Ch. 329: cf. Campbell *v.* Leach, Amb. 740: cf. also Thursby *v.* Thursby, 19 Eq. 395, 414: see *ante*, p. 88.

restricted to mines open at the date of the settlement, but extended also to new [1] mines. And a clause in the settlement, providing that lessees should not be "dispunishable for waste," was held repugnant to the other parts of the settlement.[2] Where an estate contained mines both open and new; [1] and the donee of a leasing power leased both the open and the new mines, but reserved separate rents on each mine; it was held, that, as he had not reserved a gross sum for all the mines, the power, although not well exercised as to the new, was well exercised as to the open, mines.[3]

Power during life estate.

Where a testator devised real estate to the use of trustees, in trust to pay the rents to A. for life, but impeachable for waste for "getting . . . coal" otherwise than under the power thereinafter given; remainder to the use of B. for life, impeachable for waste in like manner; with remainders over; and he empowered "the person or persons (except A.)," who, under the previous limitations, should, for the time being, "be seised of, or entitled to, the actual freehold," or "the annual rents," to grant leases of the mines in possession; it was held, that the trustees had power to grant leases during the life of A.[4]

Prior alienation by donee.

Where a testator devised estates to A. for life, remainder to B. for life, with remainders over; and empowered every person, "as and when he shall be entitled to the possession or the receipt of the rents and profits," to grant mining leases; and B. aliened his interest during A.'s life; it was held, that B., after A.'s death, might exercise the power.[5]

Liberties.

A mere power to lease lands does not authorise a lease of wayleaves or other liberties.[6] Where the liberties, which may be granted, are not accurately defined, the power may sometimes be exercised by reference to the liberties usual in the district in question.[7] Where a settlement reserved a power to lease mines, together with all necessary or usual liberties; and a lessee was authorised to build workmen's cottages, and to dig and use materials for such buildings; and the lessee

[1] As to open and new mines, see *ante*, pp. 55 *et seq.*

[2] Daly *v.* Beckett, 24 Beav. 114: see Clegg *v.* Rowland, 2 Eq. 166.

[3] Campbell *v.* Leach, Amb. 740.

[4] Leigh *v.* Balcarres, 6 C. B. 847.

[5] Lonsdale *v.* Lowther, 1900, 2 Ch. 687.

[6] See Ricketts *v.* Bell, 1 De G. & S. 335.

[7] See Scott *v.* Steward, 27 Beav. 367, 368.

built cottages accordingly; it was held, that the lease was valid.[1]

Length of term.

Where a testator empowered the tenants for life under his will to grant mining leases "for such terms or number of years" as to them "shall seem reasonable and proper," a reversionary lease for ninety-nine years was held to be within the power.[2] And it may be, that in some cases a gift of a power to lease mines *simpliciter*, without saying for how long, may authorise a lease for ninety-nine years.[3] A gift of a power to lease mines, following a gift of a life estate in real property of which they form a part, although expressed in general terms, will not, however, of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life.[4] Where a tenant for life, who was the donee of a leasing power for twenty-one years, granted a lease for twenty-six years, and the lessee expended moneys on the faith of it, he was, as purchaser, held entitled to have the defective execution aided in equity.[5]

Rents.

A power to lease at the best and most approved yearly rent has been held to have been well exercised by reserving an ore rent; ore being analogous to money, and a reservation of it going, on the death of the tenant for life, to the remainderman accordingly.[6] A power to a tenant for life to lease at the best rents, "by the acre, ton, or otherwise," has been held to have been well exercised by reserving a rent varying with the selling price; such reservation being in accordance with the custom of the county.[7] A power to a tenant for life to grant mining leases for such terms, "and under and subject to such rents and reservations and agreements," as to him "shall seem reasonable and proper," has been held to have been well

[1] Morris *v.* Rhydydefed Co., 3 H. & N. 473, 885: cf. Jegon *v.* Vivian, L. R. 1 C. P. 9, 36, 37, reversed on another point 2 *ib.* 422; Vivian *v.* Jegon, L. R. 3 H. L. 285.

[2] See Taylor *v.* Mostyn, 23 Ch. D. 583.

[3] See Vivian *v.* Jegon, L. R. 3 H. L. 293, 294, *per* Lord Cranworth: cf. Jegon *v.* Vivian, L. R. 1 C. P. 27, 28, *per* Erle, C.J.

[4] See Vivian *v.* Jegon, L. R. 3 H. L. 285, affirming Jegon *v.* Vivian, L. R. 2 C. P. 422, which reversed S. C., L. R. 1 C. P. 9. In Ernest *v.* Vivian, 33 L. J. Ch. 513, this point was expressly left open: see p. 517.

[5] Campbell *v.* Leach, Amb. 740: see also Taylor *v.* Mostyn, 23 Ch. D. 621.

[6] Campbell *v.* Leach, *sup.*

[7] Lonsdale *v.* Lowther, 1900, 2 Ch. 687.

exercised by, in the first place, granting a lease at a peppercorn rent by way of mortgage; and by subsequently charging the lease to secure a further advance.[1] A power to lease at "the best rent" may authorise a lease at an ascending minimum rent where the language of the power is similar to the provisions of the Settled Land Acts.[2]

Lease with exception of mines.

Where a tenant for life has power to lease all or any part of the settled lands for building purposes; and also power to lease mines, either with or without the surface; he may lease the lands for building purposes, with an exception of the mines and minerals.[3]

SECT. 4.—CORPORATIONS.

Crown lands.

The Commissioners of Woods may, with the consent of the Commissioners of the Treasury, lease any mines or quarries (other than mines of gold or silver) beneath or within any of the Crown lands [4] for any term not exceeding sixty-three years from the time of making the lease.[5] There may be reserved either an annual rent in money, or a rent partly in money and partly in kind, or a rent or duty upon the quantity or value of the produce.[6] And, with the approval of the Commissioners of the Treasury, a fine may be taken.[7] And, generally, the lease may be upon such conditions, and may contain such covenants and stipulations, as the Commissioners of the Treasury may approve.[8] And, as the lessee may be made dispunishable for waste,[9] a lease may be granted as well of new mines or quarries as of those already opened.[10] And licences as well as leases may be granted.[11]

[1] Taylor *v.* Mostyn, 23 Ch. D. 583.

[2] See Aldam's Settled Estate, 1902, 2 Ch. 46, referred to *ante*, p. 189.

[3] Rutland's Settled Estates, 1900, 2 Ch. 206.

[4] The general law only as to Crown lands is here stated. As to mines and quarries within the Hundred of St. Briavels, in Gloucestershire, see p. 72, *ante*, and Chap. XX. of the 3rd edition of this book.

[5] 10 Geo. 4, c. 50, s. 22; Crown Lands Act, 1873 (36 & 37 Vict. c. 36), s. 4.

[6] 10 Geo. 4, c. 50, s. 33.

[7] The Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 3. See, as to the previous state of the law, 10 Geo. 4, c. 50, ss. 28 *et seq.*

[8] 36 & 37 Vict. c. 36, s. 4.

[9] 10 Geo. 4, c. 50, s. 27.

[10] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[11] 29 & 30 Vict. c. 62, s. 3. As to licences, see *post*, pp. 269 *et seq.*

Application of rents.

One moiety of the net annual income received by the Commissioners of Woods in respect of mining leases must be carried to the account of the capital of the land revenue of the Crown, and the other moiety to the account of the income of such land revenue.[1] And provisions exist for the purpose of ascertaining the amount of the net income.[2]

Duchy of Cornwall lands—generally.

By the Duchy of Cornwall Man. Act, 1863,[3] the Prince of Wales, as Duke of Cornwall, may demise any mines or quarries, whether opened [4] or not (with power to the grantee to work, get, carry away, and dispose of the minerals, and to do all acts necessary or expedient therefor), for any term not exceeding thirty-one years in possession, but not in reversion; so that upon every such demise there be reserved a reasonable amount of rent, royalty, dues, toll, or dish; and so that no fine be taken,[5] except in certain specified cases.[6] And he may grant a new lease on the surrender of any existing lease; [7] and he may accept a surrender of any lease, and grant separate leases.[8] All leases must be enrolled in the Duchy office within six months.[9]

Tywarnhaile and Tywarnhaile Tyas.

The lord of the manor of Tywarnhaile Tyas in Cornwall and the Duke of Cornwall are empowered, by agreement in writing, enrolled in the Duchy office, to provide for and regulate the granting, demising, and working of all tin mines, tin ore, tin dues, and tin toll under the demesne and conventionary lands of the assessional manor of Tywarnhaile in the same county, and under the lands within the manor of Tywarnhaile Tyas; and the collecting, recovering, and dividing the profits and advantages accruing therefrom; and the doing of all incidental matters.[10]

Greenwich Hospital lands.

The Admiralty are empowered by the Greenwich Hospital Act, 1865,[11] to grant mining leases for any term not exceeding forty-two years. And the lessee may be made dispunishable for waste. But every such lease must take effect in possession,

[1] S. 2.
[2] *Ib.*
[3] 26 & 27 Vict. c. 49.
[4] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*
[5] S. 21.
[6] S. 23.
[7] S. 26.
[8] S. 27.
[9] Ss. 30 *et seq.* For provisions for the case of there being no duke or of his being under age, see *ante*, p. 169.
[10] 11 & 12 Vict. c. 83, s. 2. As to the assessional manors, see *ante*, pp. 70, 71.
[11] 28 & 29 Vict. c. 89.

and not in reversion; and the best yearly rent must be reserved; and no fine must be taken; and every lease must contain a condition of re-entry on non-payment; and the lessee must execute a counterpart, and must thereby covenant for payment of the reserved rent.[1] Rent may be reserved by way of toll, duty, royalty, or reservation, by the acre, the ton, or otherwise.[2]

Church lands —generally— archbishop or bishop.

An archbishop or bishop, to whom lands have been assigned as an endowment under the Act 23 & 24 Vict. c. 124,[3] may, with the approval of the Estates Committee of the Ecclesiastical Commissioners, from time to time grant mining leases of any such lands for such periods, for such considerations, upon such terms, and in such manner, as such committee under the circumstances of each case may think fit. But the committee may require that any portion of the rent reserved shall be payable to the Ecclesiastical Commissioners.[4]

Dean and Chapter.

At common law, a Dean and Chapter had complete power to grant leases of all mines and quarries beneath or within the corporate lands, and to apply the rents reserved to their own benefit.[5] But the Restraining Acts [6] by implication, and s. 9 of the Act 31 & 32 Vict. c. 114 expressly, disabled them from granting leases dispunishable of waste; and the common law power to grant leases of open [7] mines and quarries is not consistent with the enactments next mentioned.

Ecclesiastical Leasing Acts.

Under the provisions of the Eccl. Leas. Acts, 1842 and 1858,[8] every ecclesiastical corporation, aggregate or sole (with certain exceptions [9]), may demise any mines or quarries belonging to such corporation, in consideration or partly in consideration of premiums or not, or for such other considerations, and for such term or terms, and under and subject to such covenants, stipulations, conditions, and agreements on the part of the lessee, and generally in such manner, as the Ecclesiastical Commissioners shall think proper and advisable; and may grant incidental rights of opening and working, and of working

[1] S. 29.
[2] *Ib.*
[3] See *ante*, pp. 110, 111.
[4] S. 8.
[5] See Marlborough *v.* St. John, 5 De G. & Sm. 179, 180: see *ante*, p. 111.
[6] *Ante*, p. 110, 111
[7] See *ante*, pp. 55 *et seq.*
[8] 5 & 6 Vict. c. 108, ss. 4, 6; 21 & 22 Vict. c. 57, s. 1. The Eccl. Leas. Acts do not apply to the Isle of Man: 37 & 38 Vict. c. 96; 38 & 39 Vict. c. 66 (Stat. Law Rev.).
[9] See 5 & 6 Vict. c. 108, ss. 1, 6.

any adjacent mine by way of outstroke [1] or other underground communication; and may also grant such portion of land belonging to such corporation, and all such rights and liberties of way and passage, wayleaves and waterleaves, and other rights, easements, and facilities for the opening and working of all such mines or quarries, and leading and carrying away the produce thereof, or otherwise incident to mining operations, as shall be deemed expedient. And existing leases may be surrendered and renewed.[2] And contracts and licences to search for mines, and other powers preliminary to or consequent upon contracts, may be entered into, granted, and varied in such manner and for such considerations as to the Ecclesiastical Commissioners may appear desirable.[3]

Necessary to comply with statutory requirements.

However, leases cannot be granted, if the convenient enjoyment of any palace of an archbishop or bishop would be prejudiced.[4] And every lease, contract, licence, or power, must be granted or entered into with the approval of the Ecclesiastical Commissioners; and (if made by the incumbent of a benefice) with the consent of the patron; and (if made of copyhold mines or quarries, or of watercourses, ways, or easements, in, upon, over, or under, copyhold lands, where the copyhold or customary tenant is not authorised to make leases for the term of years intended to be created by such lease) with the consent of the lord; and the approval and consent must be given in a prescribed form.[5] A lease, contract, licence or power granted or entered into without the approval of the Ecclesiastical Commissioners in the prescribed form is inoperative.[6] And the mere fact, that they have permitted workings to take place during negotiations for their approval, does not preclude them, if they ultimately withhold it, from objecting to the continuance of such workings.[7]

Application of rents.

In the case of any lease granted under the Act of 1842 (unless it be granted subsequently to the Act of 1858 by any rector, vicar, or incumbent with cure of souls [8]) such portion of the improved value accruing thereunder, as by order in

[1] See *post*, pp. 287 *et seq.*
[2] 5 & 6 Vict. c. 108, ss. 5, 16.
[3] 21 & 22 Vict. c. 57, s. 4.
[4] 5 & 6 Vict. c. 108, s. 9.
[5] S. 20: see also the following sections.
[6] Eccles. Comms. *v.* Wodehouse, 1895, 1 Ch. 559.
[7] *Ib.* 560, 561.
[8] See 21 & 22 Vict. c. 57, s. 10.

council shall be determined, not being more than three-fourths nor less than a moiety of such improved value, must be paid to the Ecclesiastical Commissioners, and be subject to the provisions relating to moneys payable to them; and the remainder of such improved value is deemed to be an improvement within the meaning of the provisions relating to the incomes of archbishops and bishops, deans and canons, archdeacons and incumbents of benefices.[1] In the case of any lease granted under the Act of 1858, all moneys received in respect thereof must be applied in the same manner as moneys received in respect of sales.[2]

Church lands —farming and building leases.

By the Act empowering incumbents to grant farming and building leases [3] it is provided, that, in every case where the right is exercised, a clause shall be inserted excepting the mines and minerals. But, consistently with that, the lessee may be authorised to take brick earth, stone, lime, and other materials for erections and repairs.[4] And ecclesiastical corporations, aggregate or sole, empowered under the Eccl. Leas. Act, 1842, to grant building leases, may, as incident thereto, give liberty to the lessee to dig, take, carry away, and dispose of such earth, clay, sand, loam, or gravel, as it shall be found convenient to remove for building or repairing purposes.[5]

University and college lands.

The universities of Oxford, Cambridge, and Durham, and every college therein, and the colleges of Winchester and Eton, may, under the Univ. and Coll. Estates Act, 1898,[6] for the purposes of leasing, exercise any of the powers conferred on a tenant for life by the Settled Land Acts; [7] and for those purposes the provisions of sections 6, 7, 9, 10, 12, 13, 17, and 31 [8] of the Settled Land Act, 1882, and of section 8 [9] of the Settled Land Act, 1890, apply; [10] subject to certain

[1] 5 & 6 Vict. c. 108, s. 14.

[2] See s. 2; *ante*, p. 170. Mining leases might also have been granted under 14 & 15 Vict. c. 104 (as to the duration of which, see s. 12): see s. 9.

[3] 5 & 6 Vict. c. 27.

[4] S. 1.

[5] 5 & 6 Vict. c. 108, s. 1. Special provisions existed for regulating the relations between the Ecclesiastical Commissioners, or ecclesiastical corporations, and their former tenants of mines or minerals, who were entitled to have their leases renewed: see 23 & 24 Vict. c. 124, ss. 22, 23, 41.

[6] 61 & 62 Vict. c. 55.

[7] *Ante*, pp. 186 *et seq.*

[8] *Ante*, pp. 187, 188, 190, 193.

[9] *Ante*, p. 188.

[10] See part I. of 1st schedule.

modifications which merely adapt the Settled Land Acts to the case of universities and colleges.[1]

Application of rents.

One equal third part of the net rents and reservations received in respect of any mining lease, and of the net moneys received in respect of any licence, must be applied as part of the ordinary income of the university or college. And the remainder must be applied either in the purchase of lands for the benefit of the university or college; or in the erection of new or improvement of existing buildings; or in the improvement of lands belonging to such university or college; or in the purchase of easements in respect of adjoining lands: and, in the meantime, it must be invested, and the income applied as part of the ordinary income of the university or college.[2]

Charity lands.

The trustees of any charity lands may, on satisfying the Charity Commissioners, that the letting of any part of the charity lands on leases for working any mine, or that the digging for or raising of stone, clay, gravel, or other minerals, would be for the benefit of the charity, and on obtaining their authority, and although such leases or acts may not be authorised or permitted by the trust, grant such leases or do such acts.[3]

Materials for roads.

Trustees or commissioners of turnpike roads are empowered to contract for the demise from any person of any land for the purpose of digging materials for the repair or use of the roads.[4]

Allotments.

The power to hire land for allotments given to parish councils by the Loc. Gov. Act, 1894, does not "authorise the compulsory hiring of any mines or minerals, or confer any right "to take, sell, or carry away any gravel, sand, or clay."[5]

[1] See part II. of 1st schedule. The Act of 1898 repealed ss. 11, 15, 19, 20, and 22 of the Univ. and Coll. Estates Act, 1858 (21 & 22 Vict. c. 44).

[2] S. 21 of 21 & 22 Vict. c. 44.

[3] See Char. Trusts Act, 1853, ss. 21, 26; Char. Trusts Amend. Act, 1855, ss. 38, 39. See also Char. Trusts Amend. Act, 1855, s. 29. As to the acting trustees of a charity, see Char. Trusts Amend. Act, 1855, s. 16.

[4] 3 Geo. 4, c. 126, s. 100. As to purchases, see *ante*, p. 171. Where an allotment is made to a surveyor of highways under the Incl. Act, 8 & 9 Vict. c. 118, and no direction is made as to the ownership of the grass and herbage, the surveyor must let the allotment, reserving the right to get and take away the stone, gravel, and other materials: s. 72: see *ante*, pp. 177, 178.

[5] S. 10, sub-s. 9.

And if the land hired "shall at any time during the tenancy "thereof by the parish council be shown to the satisfaction "of the county council to be required by the landlord for the "purpose of working and getting the mines, minerals, or "surface minerals thereunder, or for any road or work to "be used in connection with such working or getting, it "shall be lawful for the landlord of such land to resume "possession thereof" upon giving notice in writing of his intention, and upon making compensation for the loss of the land.[1]

SECT. 5.—LANDS IN IRELAND.

Powers to lease.

Every archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, and other dignitary ecclesiastical, parson, rector, vicar, body politic and corporate, college, cathedral, or collegiate church, and hospital; and every trustee for charitable or other purposes or for any *feme covert* or infant of freehold or certain other specified estates; and every tenant for life with an immediate remainder to his first and every other son in tail male; and every tenant in dower or curtesy with the consent of the immediate reversioner or remainderman for an estate of inheritance, or (in case of the nonage, idiocy, or lunacy of the latter) with the consent of the guardian or committee with the approbation of the Lord Chancellor; may grant leases not exceeding forty-one years of mines and minerals in Ireland within his or their lands. And such leases may comprise certain specified quantities of land contiguous to the mines and minerals for the convenient erection thereon of workmen's houses and smelting houses and other necessary buildings.[2] And existing leases may be surrendered and re-granted.[3] Where mines have been excepted from a grant of lands in Ireland, the person entitled to the rent, in fee simple, fee farm, fee tail, or for life, with immediate remainder to his own issue, has, in respect of the mines, similar leasing powers.[4]

[1] *Ib.* sub-s. 10.

[2] 46 Geo. 3, c. 71, s. 1; 11 & 12 Vict. c. 13, ss. 1, 2; and the Acts therein mentioned.

[3] 11 & 12 Vict. c. 13, s. 3.

[4] 46 Geo. 3, c. 71, s. 1; 11 & 12 Vict. c. 13, s. 1; 23 & 24 Vict. c. 154, s. 32.

Necessary to comply with statutory requirements.

Every such lease must commence in possession without any fine; and the best rent, whether in money or kind, must be reserved; and every such lease must contain a condition for re-entry on non-payment; and the lessee must execute a counterpart.[1]

[1] 11 & 12 Vict. c. 13 s. 1; 38 & 39 Vict. c. 66 (Stat. Law Rev.).

CHAPTER IX.

CONTRACTS.

a.—GENERALLY.

Contract respecting land usually includes everything beneath.

A CONTRACT to sell or grant a lease of land will generally include the entire *solum* from the surface down to the centre of the earth. It will generally, therefore, include the mines, quarries, and minerals beneath or within it.[1] However, where a railway or waterworks company, or a local sanitary authority, give notice to take lands under the Rail. Cl. Act, 1845,[2] or the Wat. Cl. Act,[3] or the Pub. Health Am. Act, 1883,[4] they should, if they wish to take the mines and minerals thereunder, expressly include them in their notice. They will not have the right to do so in the absence of express mention.[5]

Construction —contract or lease.

Questions have sometimes arisen at law, whether, as a matter of construction, documents or a document dealing with mines constituted an agreement for a lease or an actual ease.[6]

Contract implied from acts and conduct.

Questions have also sometimes arisen, whether the acts and conduct of the parties made a mining interest a partnership asset, or whether it remained the separate property of one of the partners.[7]

Right of pre-emption.

A covenant giving an unlimited right of pre-emption of mines is obnoxious to the rule against perpetuities.[8] Subject to this, a covenant giving a right of pre-emption runs with the land ; so as to be capable of enforcement by the assigns of the covenantee against the devisees of the covenantor.[9]

[1] Williamson *v.* Wootton, 3 Dr. 213 ; Kerr *v.* Pawson, 25 Beav. 406.

[2] See 8 & 9 Vict. c. 20, s. 77 ; *post*, pp. 371 *et seq.*

[3] See 10 & 11 Vict. c. 17, ss. 12, 18 ; *post*, pp. 374 *et seq.*

[4] 46 & 47 Vict. c. 37 ; *post*, pp. 377 *et seq.*

[5] Met. R. Co. *v.* Cotton's Trustees, 45 L. T. 103 ; Errington *v.* Met. R. Co., 19 Ch. D. 560, 573, 574 ; *ante*, pp. 162, 163.

[6] See Jones *v.* Reynolds, 1 Q. B. 506 ; Doe *v.* Powell, 8 Scott, N. R. 687, 7 M. & G. 980.

[7] See Hills *v.* Parker, 7 Jur., N. S. 833, reversing Parker *v.* Hills, 5 *ib.* 809 ; Burdon *v.* Barkus, 3 Giff. 412, 4 De G. F. & J. 42.

[8] See L. & S. W. R. Co. *v.* Gomm, 20 Ch. D. 562 ; overruling on this point Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421.

[9] Birmingham Canal Co. *v.* Cartwright, *sup.* As to damages for

Uncertainty.

An agreement to lease coal "lying under land to be hereafter defined in the Bank End Estate," has been held to mean "lying under land in the Bank End Estate, the boundaries of which were to be thereafter defined;" and to be, therefore, enforceable.[1] An agreement for a lease of the "ironstone lying under the lands of Sir H. Trafford, Bart., situate at Patricroft;" Patricroft not being a place with defined territorial limits; has been held to be too uncertain.[2] And where an agreement was entered into to lease the minerals under certain land to the east of a fault; and the quantity of land was described as "supposed to be ninety-eight acres or thereabouts;" and the fault was afterwards found to run so as to leave on the east a further quantity of 75 acres; it was held, that the words "or thereabouts" could not cover a deviation to the extent in question; and that the agreement was not, therefore, enforceable.[3] And where an agreement for the sale of land contained clauses, that, in the event of there being any coals or ironstone thereunder, a royalty of 6*d.* per ton should be paid thereon; and that any mines required to be left by a certain railway company should be paid for, as if gotten, out of the money to be received for them from the company; it was held to be too uncertain.[4] An agreement to lease "coals, &c.," can seldom be capable of enforcement.[5] However, a reservation in an agreement for a lease of "all customary rights and reservations," such as liberty to "search for and work mines or minerals, &c.," has been held not to be too uncertain.[6]

b.—STATUTE OF FRAUDS.

Mine or quarry—sole owner.

A contract by the sole owner of a mine or quarry for the sale thereof, or of any interest therein, or for the grant of a lease thereof is within section 4 of the Statute of Frauds.[7] And a verbal contract between the owner of a mine and another,

breach of such a covenant, see Mundy *v.* Rutland, 23 Ch. D. 81, 94, 95.

[1] See Haywood *v.* Cope, 25 Beav. 140.

[2] Lancaster *v.* De Trafford, 31 L. J. Ch. 554.

[3] Davis *v.* Shepherd, 1 Ch. 410, 415 *et seq.*; reversing S. C. 12 L. T., N. S 538.

[4] Williamson *v.* Wootton, 3 Dr. 210.

[5] See Price *v.* Griffith, 1 De G. M. & G. 80.

[6] Parker *v.* Taswell, 2 De G. & J. 559.

[7] See Cheadle *v.* Proctor, 19 L. T., N. S. 289.

that the mine shall be demised upon royalties, and the royalties divided between them, has been held to be, in substance, a contract for the sale of a share in the mine itself.[1] Where the owner of mines covenanted, that, upon a certain event happening, he would offer them to another, and give him the refusal for one month, it was held, that the offer must be in writing; and that, consequently, the non-acceptance within a month of a parol offer did not affect the covenantee.[2] However, a person, who would not otherwise be bound, may be bound by ratification.[3] And part performance will take a case out of the statute.[4] A contract to share the profit and loss in the working of a mine or quarry, which does not affect the land itself, need not be in writing.[5]

Co-owner—partner in working.

A contract by the co-owner of a mine or quarry for the sale of his share is also within the section.[6] So is a contract for the transfer of a share of the profit and loss in the working, which affects the ownership of the land itself.[7] Part performance may, however, enable it to be enforced.[8]

Ordinary partner.

In the case of an ordinary partnership, the members are not usually entitled either to land, or to an interest in land, within the section.[9] Nor is a contract by such a member to sell his share a contract for the sale of "goods, wares, and merchandise" within section 17.[10]

c.—TITLE—NON-EXISTENCE OF MINE OR QUARRY.

Abstract of title.

A purchaser of a mine or quarry; or of any share or interest therein, which is, or includes, a share or interest in the land itself; is entitled to a regular abstract of title.[11] A purchaser of a share in a mining concern, which does not include any

[1] Caddick *v.* Skidmore, 2 De G. & J. 52.

[2] Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421, overruled upon another point: see *ante*, p. 207, n. [8].

[3] See Fothergill *v.* Phillips, 6 Ch. 770, 778.

[4] See Pollard *v.* Clayton, 1 K. & J. 471.

[5] See Forster *v.* Hale, 5 Ves. 314.

[6] See Boyce *v.* Green, Batty, 608.

[7] See Caddick *v.* Skidmore, *sup.* 52, 56.

[8] Burdon *v.* Barkus, 4 De G. F. & J. 47.

[9] See Watson *v.* Spratley, 10 Exch. 222; Powell *v.* Jessop, 18 C. B. 336; Walker *v.* Bartlett, *ib.* 845, 859; Hayter *v.* Tucker, 4 K. & J. 249. The question has usually arisen in the case of cost-book mines, as to which see pp. 519 *et seq.* of the 3rd edition of this book.

[10] Watson *v.* Spratley, *sup.*: see also Pickering *v.* Appleby, 1 Com. 353.

[11] Curling *v.* Flight, 2 Ph. 613, 617.

interest in the land itself, is not entitled to an abstract; but only to such evidence of the constitution of the concern, and of the nature of the title under which the land is worked, as will show, that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the share.[1]

Contract as to land generally—position of vendor—generally.

A contract to sell land will generally, as has been already seen,[2] include, not merely the surface, but the mines, quarries, and minerals beneath it. If, therefore, the mines or quarries have been exhausted or partly exhausted by working; or their ownership is in a third party; or there is a right in a third party to enter and work them; the vendor cannot in general enforce the contract;[3] even upon the terms of making compensation to the purchaser.[4]

Position of purchaser—generally.

It does not follow that the purchaser can, in general, in such a case, enforce the contract with compensation. The decisions, or dicta, upon this point are conflicting.[5]

Third party—difficulty of estimating compensation—value or existence of mines.

In the case of a third party having the ownership, or the right to work, the position of the vendor and purchaser is not affected, however long the third party may have refrained from exercising, and however little he may show his intention to exercise, his rights.[6] Nor, in the case of a third party having the

[1] Curling *v.* Flight, *supra.*

[2] *Ante*, p. 207.

[3] Seaman *v.* Vawdrey, 16 Ves. 390; Barton *v.* Downes, Fl. & K. 505; Martin *v.* Cotter, 3 J. & L. 496; Smithson *v.* Powell, 20 L. T. 105; Hayford *v.* Criddle, 22 Beav. 480; Ramsden *v.* Hurst, 27 L. J. Ch. 482; Pretty *v.* Solly, 26 Beav. 606; Bunbury's Estate, 1 Ir. Rep. Eq. 458; Mawson *v.* Fletcher, 6 Ch. 91, 94; Upperton *v.* Nickolson, 10 Eq. 228, 230, 6 Ch. 436; Bellamy *v.* Debenham, 1891, 1 Ch. 412; Jackson and Haden's Contract, 1906, 1 Ch. 416, 417, 425. In Upperton *v.* Nickolson and Bellamy *v.* Debenham land sold as freehold had been enfranchised under the repealed Enfranchisement Acts: see now the Copyhold Act, 1894, *ante*, p. 171.

[4] See *Re* Hargreaves', &c., Contract, 32 Ch. D. 454 (see p. 455). In this case land sold as freehold had been enfranchised under the repealed Enfranchisement Acts.

[5] See, in favour of the right to compensation, Seaman *v.* Vawdrey, *sup.*; Ramsden *v.* Hurst, *sup.* See, against, Smithson *v.* Powell, *sup.*; Bunbury's Estate, *sup.*

[6] Seaman *v.* Vawdrey, *sup.*, where there had been no exercise for 106 years: see also Ramsden *v.* Hurst, *sup.* An anonymous case is referred to by Lord St. Leonards (Vend. & Pur. last ed. 393), in which a purchaser of an estate, with some valuable mines, which were under a common, was compelled to complete, on the ground, that obstruction by the commoners was highly improbable. But the authority of the case has been doubted (see Dart, 5th ed. 1105, 1106); and it is obviously inconsistent with Seaman *v.* Vawdrey,

ownership, is the position affected, although he may be disentitled to work without the surface owner's consent.[1] Nor, if the purchaser is entitled to compensation,[2] is it affected, however difficult it may be to estimate the compensation; if, with the assistance of experts, a probable estimate is possible.[3] Nor is it affected by the fact, that the intrinsic value of the mines or quarries is insignificant: [4] or by the fact, that no proof has been given of their actual existence, if no proof has been given of their non-existence.[5]

Proof of non-existence —knowledge by purchaser.

The position of the purchaser will, however, be affected by proof of the actual non-existence of the mines or quarries, or of the cesser of the right to work them.[6] And a purchaser of land containing mines or quarries, which have been exhausted or partly exhausted by working, cannot decline the contract, if he has known of the working: [7] or even if, without actual knowledge of the extent of the working, he has known, that some working has taken place; the maxim of "*caveat emptor*" in such a case applying.[8] And where a third person is in possession of and working mines or quarries, knowledge of the title under which such possession is held will be imputed to a purchaser of the land containing such mines or quarries.[9] And such possession, to be effectual, need not be continually visible, or without cessation actively asserted.[10] And when a subsequent communication of the want of title has been made to a purchaser; and the purchaser thereupon, without objecting, goes into possession; he cannot, even if he would otherwise have been entitled to compensation,[11] insist upon being

sup., and the other cases cited in n. [3] on preceding page. See, however, Lyddal *v.* Weston, 2 Atk. 19. See further, as to the doctrine of non-user as applied to mines, *post*, pp. 531 *et seq.*

[1] See the Sc. decision of Whyte *v.* Lee, 6 R. 699.

[2] See preceding page.

[3] Ramsden *v.* Hurst, *sup.*, *per* Kindersley, V.-C.

[4] Bellamy *v.* Debenham, *sup.*: see p. 415.

[5] Barton *v.* Downes, *sup.*; Martin *v.* Cotter, *sup.*; Ramsden *v.* Hurst, *sup.*; notwithstanding Lyddal *v.* Weston, *sup.*

[6] Lyddal *v.* Weston, 2 Atk. 19; Seaman *v.* Vawdrey, 16 Ves. 390; Martin *v.* Cotter, 3 J. & L. 496.

[7] Colby *v.* Gadsden, 34 Beav. 416, 421.

[8] Colby *v.* Gadsden, 34 Beav. 421, 422.

[9] Holmes *v.* Powell, 8 De G. M. & G. 572.

[10] *Ib.* 581.

[11] See *ante*, p. 210

compensated.[1] And in doubtful cases the position of the purchaser may be affected by the circumstance that the value of the minerals was an inconsiderable ingredient in the price.[2]

Copyholds—enfranchisements—local customs.

And if the subject-matter of a contract is copyholds; or if a vendor agrees to enfranchise copyholds, and to sell them as freeholds; it is not necessary to explain, in the one case, that the right of property in the mines and quarries is, in general, in the lord;[3] or, in the other, that the transaction must take place with reference to a statute,[4] which cannot affect the lord's right without his consent:[5] such matters being notorious. And, upon a sale of lands within the districts, in which the various local customs prevail,[6] it does not seem to be necessary to refer to the existence of the mining rights under such customs:[7] such matters being also notorious.

Right to covenant for quiet enjoyment.

Where a contract for a lease of smelting works contained no words showing an intention to exclude the underlying mines, and stipulated that the lessee should covenant to keep in repair, and that the lessor should covenant for quiet enjoyment; and the title to the mines was in a third party; and the lessee went into possession, and the third party worked; and the lessee alleged, and the lessor denied, that the workings had injured the demised premises; it was held, that the lessee was entitled to have an unqualified covenant for quiet enjoyment inserted in the lease.[8]

Express provisions for rescission and compensation.

Where it was provided, that, if "any objection or requisition be delivered and persisted in, the vendor shall be at liberty to rescind;" and that, if "any error or mistake shall appear to have been made in the description of the property or of the vendor's interest therein, such error or mistake shall not vacate the sale," but should be the subject of compensation; and the purchaser objected that the minerals were in a third party; and the vendor asserted that he had a good title; and the removal of the objection would have involved delay and expense; it was held that the vendor was justified in rescinding, and that the purchaser was not entitled to specific performance

[1] Smithson *v.* Powell, 20 L. T. 105.

[2] Colby *v.* Gadsden, *sup.*

[3] Hayford *v.* Criddle, 22 Beav. 480: see *ante*, p. 67. It is sometimes in the copyholder: see *ante*, p. 67, n. [4].

[4] See *ante*, pp. 171, 172.

[5] Kerr *v.* Pawson, 25 Beav. 394, 408; a decision upon the repealed Act, 15 & 16 Vict. c. 51, s. 48.

[6] See *ante*, pp. 70—73, Chaps. XIX., XX., XXI. of the 3rd edition of this book.

[7] See Dart, 128.

[8] Onions *v.* Cohen, 2 H. & M. 354.

with compensation.[1] But where the objections provided for were merely objections "as to title or evidence of title;" and there was obviously no title to the mines; the decision was different.[2]

Contract as to mine specifically.

Where a contract is entered into to purchase or take a lease of a particular vein of coal; and the vendor or lessor does not warrant the existence of the vein; but the intention of the parties is, in substance, that the purchaser or lessee shall take his chance of finding it; and the vein proves to be non-existent; the vendor or lessor is not disentitled to enforce the contract. And, in the case of a lease, it is immaterial that a dead rent may have been made payable.[3] The enforcement of contracts relating to mines will never be refused merely on account of the speculative character of such property.[4]

d.—POSSESSION AND PAYMENT.

Purchaser or lessee entitled to subject-matter as from date of contract.

A purchaser or lessee is entitled, *primâ facie*, to the subject-matter of the contract as from the date of the contract. The consequent liability of a vendor or lessor, who, subsequently to the contract, works and removes minerals out of the land in question, has been already considered.[5]

Sale by Court.

In the case of a sale by the Court, the sale itself, and not its confirmation by the Court, transfers the property; the confirmation relating back to the day of the sale.[6] If, therefore, between the day of sale and the confirmation a mine diminishes in value, "from some accidental cause injurious to the working, from some rival coal mine, or a destructive inundation,"[7] the loss falls on the purchaser.[8] It follows, that the purchaser is entitled to insist on some arrangement being made as to the intermediate management; and an arrangement under which he is allowed to work and manage under the

[1] Mawson *v.* Fletcher, 10 Eq. 212; 6 Ch. 91.

[2] Jackson and Haden's Contract, 1905, 1 Ch. 603, 1906, 1 Ch. 402: see also Mawson *v.* Fletcher, 6 Ch. at p. 93.

[3] Jefferys *v.* Fairs, 4 Ch. D. 448.

[4] Haywood *v.* Cope, 25 Beav. 140 152: Jefferys *v.* Fairs, *sup.*

[5] See *ante*, p. 117.

[6] See Fry, 449, 450, where the law on this subject is said to be now settled.

[7] Williams *v.* Attenborough, T. & R. 76, *per* Lord Eldon.

[8] *Ib.*; Fry, 449, 450,

superintendence of the vendor will usually be proper.[1] In the case of a sale by the Court, where no provision is made as to the time of taking possession, the purchaser will be entitled to possession, or to receipt of the rents and profits, from the commencement of the month or week, in which he pays his purchase-money, according to the usual course of taking the account of the profits in question: mineral property being a species of trade, and the profits accruing daily.[2]

Taking possession not an acceptance of title.

The mere taking possession of a leasehold interest in a mine is not an acceptance of the title. It is necessary, that there should be an immediate possession, as the term is running out.[3] And where a contract for the purchase of a share in a mining partnership stipulated, that a good title should be made by a specified day, and it appeared to have been the intention, that the purchaser should immediately, and before that day, have possession, he was held not to have waived objections to the title by taking possession and acting as a partner.[4]

Motion to pay into Court.

Where, before a conveyance or lease is executed, the purchaser or lessee is allowed into possession, and commences to work, he may be ordered on motion to pay into Court the amount of the purchase-money, or the amount actually due in respect of the rents; and the order may be made without giving him the option to go out of possession.[5]

Interim "preservation" under Jud. Rules.

In an action for specific performance of an agreement to accept a colliery lease, where the lessee has been allowed into, and has long retained, possession; and has worked the coal; and then threatens to cease pumping; a motion for an injunction to restrain him from ceasing to pump is a proper motion for the "preservation" of the property under O. 50, r. 3, of the Jud. Orders and Rules.[6]

[1] See Williams *v.* Attenborough, *sup.*

[2] Wren *v.* Kirton, 8 Ves. 502; Williams *v.* Attenborough, *sup.* 70, 73, 74. See also *ante*, p. 95, n. [5], and other cases there cited. The rules which, before 30 & 31 Vict. c. 48, regulated the practice of opening biddings upon a sale by the Court of a landed estate, did not apply, where a colliery was the subject of a sale, having regard to the fluctuations in value to which colliery properties are liable: see Wren *v.* Kirton, *sup.*; Williams *v.* Attenborough, *sup.*

[3] Haywood *v.* Cope, 25 Beav. 140, 153.

[4] Stevens *v.* Guppy, 3 Russ. 171. He may be made liable as a partner for the time he acts as such: see Jefferys *v.* Smith, 3 Russ. 158.

[5] See *ante*, p. 117.

[6] Strelley *v.* Pearson, 15 Ch. D. 113.

e.—FRAUD AND INEQUALITY—DELAY [1]—ENFORCEMENT.

Fraud or misrepresentation, or even concealment, by either party, will frequently be a bar to the enforcement of a contract to sell or purchase, or to grant or take a lease of, a mine or quarry.[2] Fraud or concealment—generally.

Knowledge by a purchaser, not in a fiduciary relation to his vendor (such as, for this purpose, probably exists between the tenant for life and the trustees of a settled estate [3]), of the existence of a mine under the land of the vendor, who is ignorant of its existence; and concealment of the knowledge; do not of themselves constitute a fraud. For there is no legal obligation on such a purchaser to disclose his knowledge.[4] And the law is the same where the value of a mine, and not its existence, is in question.[5] But of course any contrivance on the part of the purchaser, or even a word or a gesture from him, may give his conduct another complexion.[6] And if the vendor had no means of access to the mine; and the purchaser improperly obtained access thereto, and acquired his knowledge by means of such improper access; his concealment would constitute a fraud.[7] Purchaser concealing existence or value of mine.

And where the owners of a colliery had entered into an agreement with an adjoining landowner for the purchase of his estate; without disclosing the fact, of which he was ignorant, that they had gotten a considerable quantity of coal from under it; it was held, that the purchasers could not enforce the contract. And it was considered immaterial, that the sale was not shown to be at an undervalue.[8] For the purchasers were bound to give the vendor the opportunity of taking whatever proceedings on account of their trespass he should think proper. And he would have been entitled in such proceedings to obtain a much larger sum as compensation for the wrongful severance than the value of the coal while ungotten.[9] Purchaser concealing previous trespass.

[1] As to fraud or delay, where rescission or compensation is sought, see *post*, pp. 220—222.

[2] See Haywood *v.* Cope, 25 Beav. 140, 148; Higgins *v.* Samels, 2 J. & H. 460.

[3] See Dicconson *v.* Talbot, 6 Ch. 32, 37, 38.

[4] Fox *v.* Mackreth, 2 B. C. C. 420; Turner *v.* Harvey, Jac. 178; Luddy's Trustee *v.* Peard, 33 Ch. D. 520.

[5] Fothergill *v.* Phillips, 6 Ch. 779.

[6] Walters *v.* Morgan, 3 De G. F. & J. 718, 724.

[7] Fothergill *v.* Phillips, *sup.* 779, 780.

[8] Fothergill *v.* Phillips, 6 Ch. 770 see *post*, pp. 537 *et seq.*

[9] *Ib.* 780.

Lessee acting independently.

Where a mine owner had worked mines, and then abandoned them, because the working was unprofitable; and twenty years subsequently entered into negotiations to lease them; and the lessee during these negotiations made a personal inspection of them, and formed an independent estimate of their value; and an agreement for a lease was then entered into; and the mines turned out worthless; the lessor was, having regard to the speculative character of mining property, held entitled to enforce the agreement. And it was considered immaterial, that he had suppressed the facts of the former working and the abandonment, and that the lessee professed to be ignorant of mining matters.[1]

Purchaser condoning.

And fraud may be condoned. And it has been held to be condoned by a purchaser, who, with knowledge of the fact, offered to perform his part of the contract, and required the vendor to do the same within a limited time.[2]

Inequality.

If a contract stipulates for the insertion of "all usual covenants," its omission to stipulate for the insertion of a covenant to pay a dead rent does not make it objectionable for inequality.[3]

Delay a bar to enforcement.

Having regard to the fluctuating character of mining property, it is incumbent upon a person, who intends to enforce a contract to sell or purchase, or to grant or take a lease or a renewal of a lease of, a mine or quarry, to be prompt in asserting his title. Such delays as five years and nine months,[4] or three years and five months,[5] or two years and six months,[6] or even eleven months,[7] after the parties had been at arms' length, have long been considered fatal to relief. And it has, in such cases, been considered immaterial, that the party asserting the title has by an occupation of the surface been in constructive possession of the mine or quarry in question;[8] or has even gone into actual possession of the mine or quarry

[1] Haywood *v.* Cope, 25 Beav. 140, 148.

[2] Macbryde *v.* Weekes, 22 Beav. 533.

[3] Walters *v.* Morgan, *sup.* 722. See *ib.* generally as to inequality.

[4] Sharp *v.* Wright, 28 Beav. 150. See also Alloway *v.* Braine, 26 *ib.* 575.

[5] Eads *v.* Williams, 4 De G. M. & G. 674, 691.

[6] Walker *v.* Jefferys, 1 Ha. 341.

[7] Pollard *v.* Clayton, 1 K. & J. 462: see also Parker *v.* Frith, 1 S. & S. 199, n.; Colby *v.* Gadsden, 34 Beav. 418; and cf. Allen *v.* Hilton, 14 Ves. 58.

[8] Walker *v.* Jefferys, *sup.* 349.

in question and commenced working it, if, before the parties were at arms' length, such possession was abandoned.[1] Subsequently, however, delays of even shorter periods, such as five months and four days,[2] or even three months and thirteen days,[3] after the parties had been at arms' length, were held to be fatal to relief.

Unless other party acquiesces.

Delay by one party may, however, be condoned by acquiescence on the part of the other.[4]

Time "of the essence" in mining contracts.

Although time may not have been originally named, it is, in contracts for mining leases, of the essence of the contract; and the lessee may, therefore, always fix a reasonable time for completion, and, on default by the lessor, may rescind the contract.[5] And where more than two months had elapsed from the date of the contract, and the lessee then fixed a month for the completion, it was held to be a reasonable time; although there were matters essential for the completion, which did not depend on the lessor, but on third parties.[6]

f.—SPECIFIC PERFORMANCE AND DAMAGES.

Mine or quarry—specific performance may be had.

Assuming that a contract to sell or purchase, or to grant or take a lease of, a mine or quarry is not open to objection on the grounds already mentioned,[7] it is, in general, capable of being specifically enforced; and the party injured by its breach is not necessarily confined to his remedy in damages.[8]

Specific performance as to moiety.

So the Court will in general grant specific performance of an agreement for a lease of an undivided moiety of mineral property.[9] However; when the intention of the lessor was to grant a lease of the entirety, and nothing else; he will not in general be compelled to grant a lease of a moiety only.[10]

Covenants to be inserted where contract silent—inspection.

Under an agreement for a lease of mineral property upon

[1] Eads *v.* Williams, *sup.*

[2] Huxham *v.* Llewellyn, 21 W. R. 570. It is not a sufficient explanation of a delay to say that the defendant's solicitor was suffering from mental alienation: *ib.* 766.

[3] Glasbrook *v.* Richardson, 23 W. R. 51.

[4] Haywood *v.* Cope, 25 Beav. 140; Colby *v.* Gadsden, 34 *ib.* 416.

[5] Macbryde *v.* Weekes, 22 Beav. 533: see Green *v.* Sevin, 13 Ch. D. 594.

[6] Macbryde *v.* Weekes, *sup.*

[7] See *ante*, pp. 207—213, 215—217.

[8] The principle was laid down in so old a case as Buckinghamshire *v.* Ward, cited in 3 Atk. 385.

[9] Hexter *v.* Pearce, 1900, 1 Ch. 341.

[10] Price *v.* Griffith, 1 De G. M. & G. 80, as explained in Hexter *v.* Pearce, *sup.*

royalties, with stipulations as to the mode of working, the lessor is entitled to have a covenant inserted enabling him and his agents, at reasonable times and on giving reasonable notice, to enter the mines for the purpose of seeing the mode of working, and inspecting and measuring the quantity got.[1] And where, under a contract for the sale and purchase of mineral property, the price is not made payable at once, but is made payable by instalments depending on the extent of the workings, the vendor has a similar right for the purpose of inspecting and measuring the quantity got.[2]

"Usual" clauses.

Under an agreement for a lease, to contain "all usual and customary mining clauses," the lessor is entitled to have a proviso inserted for re-entry on breach of covenant to pay rent or royalty.[3] And he is apparently entitled to have provisions inserted prescribing proper modes and a proper time of working, and protecting the mine against the influx of water.[4] But he is not entitled to have a proviso inserted for re-entry on breach of any covenant or provision other than for payment of rent or royalty.[5] Nor is he entitled to have a clause inserted of forfeiture on bankruptcy or insolvency; or a covenant inserted against assignment; notwithstanding that such clause or covenant may be usual in the district in question.[6] In a lease of a colliery in Derbyshire a provision, that, when the mines demised are incapable of being worked to a profit, the lessee shall be entitled to determine, is not "usual."[7] Nor is it a provision, which, in the absence of stipulation or custom, ought to be inserted in any mining lease.[8]

Easements—specific performance may be had.

Specific performance may, in general, be had of a contract

[1] Blakesley *v.* Whieldon, 1 Ha. 176, 181, 182: cf. Lewis *v.* Marsh, 8 Ha. 97, 99.

[2] Blakesley *v.* Whieldon, *sup.* 176: see the form of the decree at p. 183.

[3] Hodgkinson *v.* Crowe, 10 Ch. 622.

[4] Walters *v.* Morgan, 3 De G. F. & J. 722; Hodgkinson *v.* Crowe, 19 Eq. 594.

[5] Hodgkinson *v.* Crowe, 10 Ch. 622.

[6] *Ib.* 19 Eq. 591. The district in question was North Staffordshire.

[7] Strelley *v.* Pearson, 15 Ch. D. 113.

[8] *Ib.* Cf. Ricketts *v.* Bell, 1 Dr. & Sm. 335. As to Scotch Law, see Gowan *v.* Christie, L. R. 2 Sc. & D. 273. In a Scotch contract, providing for the insertion of all "clauses usual and customary," the tenant was held entitled to have a clause inserted, empowering him to remove buildings, &c., at the end of the lease, if not taken by the landlord at a valuation: Wilson *v.* Douglas, 7 M. 112. When the Court directs a reference to chambers to settle the terms of a lease, it will, when convenient, at the same time make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings: Strelley *v.* Pearson, *sup.*

to grant or take a lease of a mining easement. However, specific performance was refused of a contract to take a lease of a wayleave, and the plaintiff was left to his remedy in damages; the defendant having desired to acquire the wayleave for the purposes of a colliery which he intended to take, and having subsequently found it impossible to obtain a lease of the colliery.[1] And specific performance was refused of a contract to take a renewed lease of a wayleave; the contract having been entered into not by the plaintiff, who was competent to perform it, but by his predecessor in title, who was incompetent; and the plaintiff having declined to allow a clause to be inserted empowering the lessees to determine upon notice, although a similar clause was contained in the existing lease, and was usual, if not universal, in the neighbourhood.[2]

Covenant as to easements not running with land.

A covenant by the owner of land, that he and his successors in title will always use a neighbouring railway for the carriage of minerals, does not run with the land.[3]

Contract to sell slag to be removed.

A contract to sell slag to be severed and removed by the purchasers is a contract to grant an interest in land; so as to prevent the purchasers from recovering damages for the loss of their bargain.[4]

Minerals—specific performance may not be had.

Specific performance cannot, it seems, be, under any circumstances, obtained of a contract for the sale or purchase of minerals; as opposed to a contract for the sale or purchase of the mine or quarry which contains them.[5] Such a contract stands upon the same footing as a contract for the sale of ordinary chattels. And the mere circumstance, that the minerals in question are to be supplied, and paid for, by instalments;[6] or that they are of a particular description;[7] or that they are to be dug out of a mine in a particular locality;[8] cannot, it seems, make the breach of the contract

[1] Anon. *v.* White, 3 Swanst. 108, n.

[2] Ricketts *v.* Bell, 1 De G. & Sm. 335.

[3] See Keppell *v.* Bailey, 2 M. & K. 534, 535.

[4] Morgan *v.* Russell, 1909, 1 K. B. 357.

[5] Pollard *v.* Clayton, 1 K. & J. 462; Fothergill *v.* Rowland, 17 Eq. 132.

[6] *Ib.*, notwithstanding Taylor *v.* Neville, 3 Atk. 384.

[7] Pollard *v.* Clayton, *sup.* See also Dominion Coal, &c., Co. *v.* Dominion Iron, &c., Co., 1909, A. C. 293. See, however, Fothergill *v.* Rowland, *sup.* 139.

[8] Pollard *v.* Clayton, *sup.* See, however, Fothergill *v.* Rowland, *sup.*

incapable of estimation by damages. *A fortiori*, if the contract directly or indirectly involves the working of the mine or quarry, it cannot be specifically enforced.[1] If the law were otherwise, the Court would be subjected to incessant applications as to the working; and would, in effect, have thrown upon it the duty of managing and superintending the working: and this duty it invariably declines.[2] And an injunction will not be granted to restrain the breach of a contract, of which specific performance would be refused.[3]

Covenant as to minerals not running with land.

A covenant by the owner of land, that he and his successors in title will always buy minerals at a neighbouring mine or quarry, does not run with the land.[4]

g.—FRAUD—MISTAKE—DELAY [5]—RESCISSION AND COMPENSATION.

Fraud may entitle injured party to rescind.

Fraud or misrepresentation may entitle the injured party to have a contract to sell or purchase, or to grant or take a lease of, a mine or quarry, set aside.[6] And where three persons were working a colliery in partnership; and the share of one was put up for sale by auction by the sheriff under an execution; and the two others concealed the actual condition of, and refused to allow third parties any opportunity of examining, the colliery, and thereby discouraged bidders; and then themselves became the purchasers; it was held, that the purchase could not stand.[7]

Unless he is not misled.

But a purchaser of mining property, who alleges, that its prospects had been exaggerated by the vendor, will not be entitled to any remedy, if he has had as full an opportunity as the vendor of ascertaining the real prospects.[8] And if a purchaser, choosing to judge for himself, does not avail himself

[1] Pollard *v.* Clayton, *sup.* See also Booth *v.* Pollard, 4 Y. & C. Eq. Exch. 61; and cf. Flint *v.* Brandon, 8 Ves. 159.

[2] Pollard *v.* Clayton, *sup.*; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552.

[3] Pollard *v.* Clayton, *sup.*; Fothergill *v.* Rowland, *sup.* 132.

[4] Keppell *v.* Bailey, 2 My. & K. 534, 535, 536.

[5] As to fraud or delay as a bar to enforcement, see *ante*, pp. 215—217.

[6] See Phosphate Sewage Co. *v.* Hartmont, 5 Ch. D. 394; Erlanger *v.* New Sombrero Co., 3 A. C. 1218, 1260; and cases there cited.

[7] Perens *v.* Johnson, 3 Sm. & G. 419: see the decree, p. 427.

[8] Jennings *v.* Broughton, 17 Beav. 234, 5 De G. M. & G. 126: cf. Haywood *v.* Cope, 25 Beav. 140; Higgins *v.* Samuels, 2 J. & H. 460; Aberaman Ironworks *v.* Wickens, 4 Ch. 101.

of the knowledge or the means of knowledge open to him or his agents, he cannot be heard to say he was deceived; the doctrine of *caveat emptor* applying, and knowledge of his agents being as binding as his own knowledge.[1] Indeed, having regard to the speculative character of mining property, general statements as to the prospects and capabilities of a mine are entitled to less weight in support of a charge of fraud than similar statements might receive in the case of other kinds of property.[2]

Or delays.

And unless the injured party is prompt in asserting his rights, he will lose them. Having regard to its uncertain and speculative character, the defence of laches applies with peculiar force to an action seeking to set aside a sale or lease of mineral property.[3]

Receiver and manager.

In a suit to set aside, for fraud, a contract to purchase a leasehold colliery, under which the purchasers had gone into possession and commenced working, a receiver and manager was appointed until the hearing: the purchasers alleging that the colliery was being worked at a loss; and that it was necessary to keep it working, both to prevent forfeiture to the landlord, and to prevent its being drowned out; and offering to supply the means of working it.[4]

Mutual mistake.

A contract to sell or purchase, or to grant or take a lease of, a mine or quarry may also be set aside as founded on mutual mistake. And a serious misconception as to quantity is probably sufficient to justify the interposition of the Court.[5] The mere existence of unknown faults is not, however, a

[1] Attwood *v.* Small, 6 Cl. & F. 232. See this case generally as to fraud. It reversed a decree of the Exch. See the subsequent proceedings in the latter Court, nom. Small *v.* Attwood, 3 Y. & C. Exch. Eq. 105, 501.

[2] See Jennings *v.* Broughton, 17 Beav. 234, 239, 241.

[3] Jennings *v.* Broughton, 5 De G. M. & G. 126, 139; Ernest *v.* Vivian, 33 L. J. Ch. 513; Featherstonhaugh *v.* Lee Moor Co., 1 Eq. 318, 335. See also Erlanger *v.* New Sombrero Co., 3 A. C. 1231, 1240, 1247, 1254, 1257, 1281. Nine months were there held by the majority of the Lords (Lord Cairns doubting) an insufficient time to bar the right. It was in the same case said by Lords Blackburn and Gordon (pp. 1282, 1285), that a company is in a more favourable position as regards the defence of laches than an individual.

[4] Gibbs *v.* David, 20 Eq. 373.

[5] See Davis *v.* Shepherd (the facts of which are stated, *ante*, p. 208), 1 Ch. 419. As to mistakes in the grants of gales in the Hundred of St. Briavels, see A.-G. *v.* Jackson, 5 Ha. 355, 366 *et seq.*

ground for avoiding the purchase of a mine. Mines are notoriously liable to faults; and the doctrine of *caveat emptor* may therefore with especial propriety be in such a case invoked for the benefit of the vendor.[1]

Compensation in lieu of rescission.

It may sometimes be inequitable to rescind a contract, notwithstanding that the vendor may have made misrepresentations as to value. The purchaser may, for instance, have been allowed into possession, and have expended large sums in workings. In such a case the purchaser will be entitled to compensation.[2]

[1] See Ridgway *v.* Sneyd, Kay, 635, 636.

[2] Powell *v.* Elliott, 10 Ch. 424. As to the measure, see S. C.

CHAPTER X.

SALES, ENFRANCHISEMENTS, INCLOSURES, AND MORTGAGES.

a.—GENERALLY.

Mines or quarries, whether open or new, lie in grant.

Of course, since the Act 8 & 9 Vict. c. 106, s. 2, open [1] mines or quarries, which are a corporeal hereditament, lie in grant.[2] And whether new [1] mines or quarries are to be regarded as an incorporeal or a corporeal hereditament,[3] they also, since the Act, even as the separate subject-matter of a sale, lie in grant.[4]

Exception and reservation—re-grant.

A mine or quarry is properly the subject-matter of an exception, and is not properly the subject-matter of a reservation. An exception is part of the thing granted. A reservation issues out of the thing granted, such as a rent. And where a mine or quarry purports to be reserved, it is, in fact, excepted.[5] A mine or quarry is not properly the

[1] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[2] Livery of seisin was formerly essential to their conveyance. "By a grant of mines of lead, &c., the land itself will pass, if livery of seisin be made thereof; but otherwise it seems not, and then the grantee hath by the grant a power to dig only granted to him": Shep. Touch. Prest. 96. See Sutherland *v.* Heathcote, 1892, 1 Ch. 483.

[3] Upon the passage cited in n. [2], Mr. Preston remarks: "In regard to mines not open at the date of the grant, this distinction (a distinction founded on principle), though no decision is found on the point, may be taken. The grantee has an incorporeal and not a corporeal hereditament; an interest which would pass by grant without livery of seisin." And Burt. Comp. has remarks to the same effect: 361. Apparently, however, new mines or quarries are, or are capable of being, a corporeal hereditament: see Wilkinson *v.* Proud, 11 M. & W. 35, 36; Low Moor Co. *v.* Stanley Coal Co., 34 L. T., N. S. 186 (Mellish, L.J., doubting). Either it was possible to overcome the physical difficulty of livery by cutting a communication from the surface, or a symbolical delivery on the surface was perhaps sufficient: see Wilkinson *v.* Proud, *sup.* Cf. Keyse *v.* Powell, 2 E. & B. 140, 142; Carlyon *v.* Lovering, 1 H. & N. 799.

[4] Amphlett, B., in Low Moor Co. *v.* Stanley Coal Co. (33 L. T., N. S. 445), appears to have doubted this.

[5] See Cardigan *v.* Armitage, 2 B. & C. 197, 207; Fancy *v.* Scott, 2 M. & Ry. 335; Doe *v.* Lock, 2 A. & E. 705; Wickham *v.* Hawker, 7 M. & W. 63; Durham, &c., Co. *v.* Walker, 2 Q. B. 940; McDonnell *v.* McKinty, 10 Ir. L. R. 525; Proud *v.* Bates, 34 L. J. Ch. 406; Hamilton *v.* Graham, L. R. 2 Sc. & D. 168; Antrim *v.* Gray, 9 Ir. Rep. Eq. 520; Eardley *v.* Granville,

subject-matter of a re-grant to the grantor. In this respect it differs from a licence to work minerals.[1]

Conveyance of land—*primâ facie*, effect.

A conveyance of land is, *primâ facie*, a conveyance of the entire *solum* from the surface down to the centre.[2] This presumption may, however, be rebutted where the mines were made a separate tenement by previous dealings. For example, where there were four tenants in common of 1500 acres of land, including the mines; and in 1699 the co-owners conveyed to Barnes (who was one of them) in fee simple the surface of 90 acres (a part of the 1500 acres), and an undivided 4th part of the mines under the entirety; and the co-owners and their successors from that time down to 1815, habitually demised the mines under the entirety as one colliery, and in 1815 Barnes' successor conveyed the 90 acres to Whittingham; and it was proved that Whittingham, when he purchased, knew all the foregoing facts; it was held that the common knowledge of both the contracting parties was sufficient to rebut the presumption of law; and that the conveyance of 1815 did not therefore carry the undivided 4th of the mines under the 90 acres.[3] And in circumstances otherwise similar, a similar presumption would have been made, even if Barnes' successor had been entitled to the entirety of the mines under the 90 acres.[4]

Conv. of specific mines.

A conveyance of a specified mine or mines does not of course carry the underlying mines.[5]

Conv. of manor includes mines or quarries.

Independently of the Conv. Act, 1881, mines, quarries, and minerals, if unsevered from a manor, will pass under a mere conveyance of the manor as such. But they will not do so if they have once been severed from the manor. For, once severed, they could not be reunited; as they might be to the surface.[6] And it is possible that an enfranchisement of

3 Ch. D. 834. In a loose sense of the word "exception," it may include a restriction on working: see Mostyn *v.* Lancaster, 23 Ch. D. 602, 624.

[1] See Hamilton *v.* Dunlop, 10 A. C. 813, cited *post*, p. 276; Sutherland *v.* Heathcote, 1892, 1 Ch. 475, cited *post*, p. 275. There may be a re-grant to a third person by a person in whom the property is once vested: see Denison *v.* Holliday, 1 H. & N. 647.

[2] Harris *v.* Ryding, 5 M. & W. 72, 74; Williams *v.* Bagnall, 15 W. R. 275; Spoor *v.* Green, L. R. 9 Exch. 107; Jersey *v.* Neath Poor Law Union, 22 Q. B. D. 558.

[3] Wright *v.* Leigh, coram Fry, L.J., April 2nd, 1890.

[4] *Ib.*

[5] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 111, 131.

[6] See Wolst. Conv. Acts, 32.

copyholds by a conveyance excepting the minerals would operate as a severance.[1] They will, however, do so under the usual general words of the conveyance. And the minerals in a waste will pass under the general words, although their existence was neither known to nor suspected by either of the parties to the conveyance.[2] A conveyance of a manor as such made after the commencement of the Conv. Act, 1881, includes, *primâ facie*, all mines, minerals, and quarries appertaining thereto, actually or by reputation.[3]

Conv. under Rail. Cl. Act, &c.

Where lands are purchased under the provisions of the Rail. Cl. Cons. Act, 1845,[4] or the Wat. Cl. Act,[5] or the Pub. Health Am. Act, 1883,[6] the company or authority in question are entitled to such parts of the soil as are not "minerals" [7] within the exception mentioned in section 77 [8] of the Rail. Cl. Act, or section 18 [9] of the Wat. Cl. Act.[10] They are also entitled to such "parts" of the "minerals" as shall be necessary to be dug or carried away or used in the construction of the works; whether before or after their line is open for traffic.[11] And they may, it seems, be "used" without being first "dug or carried away." Under the Wat. Cl. Act, for example, a right would probably be acquired to minerals forming the bottom and sides of a reservoir.[12] No right is, however, acquired to the parts themselves except in so far as they are dug or carried away or used.[13] And, with the above exceptions, they are not entitled to the mines or minerals under the lands (at all events, where they are not expressly named in their notice to take [14]), unless they are expressly named in their conveyance.[15] And this so whether the purchase is compulsory or voluntary.[16] And it

[1] See Wolst. Conv. Acts, 32.

[2] See A.-G. *v.* Ewelme Hosp., 17 Beav. 366, 386.

[3] See 44 & 45 Vict. c. 41, s. 6.

[4] 8 & 9 Vict. c. 20, s. 77.

[5] 10 & 11 Vict. c. 17, ss. 12, 18.

[6] 46 & 47 Vict. c. 37.

[7] See *ante*, pp. 45 *et seq.* 165.

[8] See *post*, p. 371.

[9] See *post*, p. 374.

[10] As to powers to purchase, see *ante*, pp. 161 *et seq.*

[11] Hamilton *v.* N. B. Rail. Co., 13 R. 454.

[12] Glasgow *v.* Farie, 13 A. C. 683, 686, *per* Lord Herschell.

[13] *Ib.* 678, 688, *per* Lords Watson and Macnaghten. The statement to the contrary in Hamilton *v.* N. B. R. Co., 13 R. 454, must be taken to be overruled: see further, as to the words "necessary," &c., *ante*, pp. 132, 133.

[14] See Errington *v.* Met. Ry. Co., 19 Ch. D. 563.

[15] *Ib.* 574; Pountney *v.* Clayton, 11 Q. B. D. 833, 834. Cf. Hopetoun *v.* N. B. Rail. Co., 20 R. 704.

[16] Errington *v.* Met. R. Co., *sup.*, at pp. 569, 573, 579.

need hardly be said, that, where the mines and minerals are not expressly named in a notice to take, the company or authority are not entitled to have them expressly named in their conveyance.[1] The provisions of the Acts apply equally to minerals worked by surface as to those worked by underground workings.[2] Having regard to the words "parts . . . as shall be necessary" difficulties may of course easily arise as to the precise quantum of minerals which is acquired.[3]

Vesting of "street."

When a street becomes vested in an urban authority under the Pub. Health Act, 1875, they do not acquire the ownership of the mines.[4]

Enfranchisement—sales to redeem land tax.

It has been already seen, that no statutory enfranchisement can affect the rights of any lord in mines, minerals, or quarries unless with his express consent in writing;[5] and that no mines or minerals belonging to lands, which may be sold by an ecclesiastical corporation for the purpose of redeeming land tax, shall pass by the conveyance of such lands, either by express or general words.[6]

Purchases without reference to empowering Acts.

Where an Act gives a company compulsory purchasing powers, but reserves the right to mines, and the company subsequently purchase without express reference to the Act, their position will nevertheless be regulated by the Act, in the absence of agreement to the contrary.[7] Their conveyance will be read as if the Act were "incorporated therein; and that, too, whether the lands were taken under compulsion or by agreement."[8] In like manner a conveyance of land with an exception in such terms as "the whole coal and other minerals in the said lands in terms of the Wat. Cl. Act, 1847," although carried into effect by an ordinary deed, cannot be construed

[1] Met. Ry. Co. and Cotton's Trustees, 45 L. T. 103; Errington *v.* Met. Ry. Co., *sup.* 560.

[2] See, as to this, *ante*, pp. 162, 163.

[3] Glasgow *v.* Farie, 13 A. C. 685, 686, *per* Lord Herschell.

[4] See Coverdale *v.* Charlton, 4 Q. Q. D. 116, 121; Rolls *v.* St. George, 14 Ch. D. 796; Wandsworth Bd. of Wks. *v.* United Telephone Co., 13 Q. B. D. 914, 927; Tunbridge Wells *v.* Baird, 1896, A. C. 434; 41 & 42 Vict. c. 77, s. 27.

[5] *Ante*, p. 172.

[6] *Ante*, p. 170.

[7] See Elliot *v.* N. E. R. Co., 10 H. L. Cas. 333, *per* Lord Chelmsford; G. W. R. Co. *v.* Fletcher, 5 H. & N. 697, *per* Cockburn, C.J.: cf. Ruabon Brick, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 450—452, *per* Lindley, L.J.; R. *v.* L. & N. W. R. Co., 1899, 1 Q. B. 943, *per* Collins, L.J.

[8] Manchester Corporation *v.* New Moss Coll., 1906, 1 Ch. at 289, *per* Farwell, J. The actual decision was reversed on appeal (S. C. 1906, 2 Ch. 564, and New Moss Coll. *v.* Manchester Corporation, 1908, A. C. 117).

without regard to the statutory meaning of the words "mines of coal, ironstone, slate, or other minerals" in section 18 of the Act.[1] It has been said, however, that if a railway or waterworks company purchase under the Rail. or Wat. Cl. Act, with an exception of the "mines and minerals," without more, the words "mines and minerals" may, perhaps, be construed according to their strict meaning.[2]

Quantum of purchase when mines excepted.

The expression "surface land," when used in reference to land from which the mines and minerals are excepted, is usually inaccurate. When land is purchased, with an exception of the mines and minerals, the purchase includes, not merely the surface, but the whole of the subsoil, which does not actually consist of mines and minerals.[3]

b.—PARCELS—CONSTRUCTION.

Construction —Inclosure Acts.

Questions have frequently arisen under Inclosure Acts whether, as a matter of construction, the right of the lord to mines and minerals has or has not been saved.[4] Sometimes the ownership of the mines under roads directed to be set out is left in doubt.[5]

Construction —conveyances.

Questions have also arisen under conveyances whether, as a matter of construction, the right to the mines has or has not passed.[6] Sometimes, upon the construction of a conveyance of

[1] Glasgow *v.* Farie, 13 A. C. 680, *per* Lord Herschell: see *ante*, p. 39.

[2] See Mid. Ry. Co. *v.* Robinson, 15 A. C. 34—36, *per* Lord Macnaghten: see as to the strict meaning, *ante*, p. 25.

[3] Pountney *v.* Clayton, 11 Q. B. D. 833, 837, 839, 840, *per* Lord Esher and Bowen, L.J.; L. & Y. Ry. Co. *v.* Knowles, 20 *ib.* 402, 403, *per* Lord Esher; Jersey *v.* Neath Poor Law Union, 22 *ib.* 559, 561, *per* Lord Esher and Bowen, L.J.; Ruabon Brick, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 448, 457, *per* Bowen, L.J.; *In re* Gerard and L. & N. W. Ry. Co., 1895, 1 Q. B. 464, 470, *per* Lord Esher and Rigby, L.J.; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 109, 119, *per* Hardy, M.R., and Moulton, L.J.

[4] For decisions in favour of the lord, see Rosse *v.* Wainman; 14 M. & W. 859; Micklethwait *v.* Winter, 6 Exch. 644; Ewart *v.* Graham, 7 H. L. C. 331, 343 (affirming Graham *v.* Ewart, 1 H. & N. 550; and questioning, if not overruling, Greathead *v.* Morley, 3 M. & G. 139); Robinson *v.* Wray, L. R. 1 C. P. 490; Musgrave *v.* Forster, L. R. 6 Q. B. 590. For a decision against, see Townley *v.* Gibson, 2 T. R. 701. See also Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108; Listowel *v.* Gibbings, 9 *ib.* 223. And cf. Pretty *v.* Solly, 26 Beav. 606; Wakefield *v.* Buccleuch, 4 Eq. 613; Buccleuch *v.* Wakefield, L. R. 4 H. L. 377.

[5] See Benfieldside Local Board *v.* Consett Iron Co., 3 Exch. D. 65, *per* Cleasby, B.; Haigh *v.* West, 1898, 2 Q. B. 29.

[6] Denison *v.* Holliday, 3 H. & N.

lands and mines on both sides of a canal, the title to the mines under the canal remains unaffected.[1]

Payment on minerals "found."

Where a conveyance of coal contained a covenant by the purchaser to pay as the price 40*l.* for every acre which should be "found;" and, until the price should be paid, to pay 40*l.* per annum; it was held, that the "finding" was not a condition precedent to recovering the annual sum.[2]

Rent-charge on minerals raised.

A covenant in a conveyance to pay a rent-charge to the grantor in respect of minerals raised from any mines or pits on the property conveyed is not void as a perpetuity. But it is not payable in respect of minerals not worked from the property conveyed.[3]

Crown grants.

It may not be possible, as against the Crown, to imply even those privileges without which the grant of mines would be useless. But if the grant contains words fairly susceptible of a construction giving those privileges; and not fairly referable to other matters; it ought to receive that construction; especially if there have been acts of ownership consistent therewith. And the use of the word "commodities" (a frequent word in old grants) is under such circumstances sufficient.[4] Where a grant by the Crown, as lord of a manor, of coal mines within "waste grounds" contained a proviso, that the grant should be construed strictly against the Crown, it was held, that coal which formed part of the manor, but lay under a foreshore between high and low-water marks, was included.[5]

c.—MORTGAGES.

Repayment.

It is always proper in mortgages of mines, having regard to the diminishing nature of the security, for the mortgagee to

670; affirming S. C. 1 H. & N. 631; Antrim *v.* Gray, 9 Ir. Rep. Eq. 513; Thompson *v.* Hickman, 1907, 1 Ch. 550.

[1] See Chamber Colliery Co. *v.* Rochdale Canal Co., 1895, A. C. at pp. 575, 576, *per* Lord Herschell, 578, 579, *per* Lord Watson, 584, *per* Lord Macnaghten.

[2] Jowett *v.* Spencer, 1 Exch. 647; reversing S. C. 15 M. & W. 662. "Found" was said to mean "ascertained to lie and be."

[3] Morgan *v.* Davey, 1 Cab. & E. 114.

[4] The author has seen an opinion of Lord Selborne, when at the Bar (July 1st, 1861), so advising. As to acts of ownership, see *ante*, pp. 77 *et seq.*

[5] See A.-G. *v.* Hanmer, 27 L. J. Ch. 837. As to production of documents in cases as to boundaries, see Jenkins *v.* Bushby, 35 L. J. Ch. 400; Ponsonby *v.* Hartley, W. N. 1883, 13, 44.

stipulate that the principal money advanced shall be repayable by instalments.[1]

Redemption —successive periods.

The fact, that the mortgaged property consists of a mining lease with a short term, is alone a reason why incumbrancers subsequent to the plaintiff ought not to be allowed successive periods for redemption.[2]

Accruing rents—further account.

Where property subject to a mining lease is in mortgage; and the mortgagee commences foreclosure proceedings, and obtains the appointment of a receiver; he is probably entitled to have a direction inserted in the foreclosure judgment, that persons redeeming, or the plaintiff in the event of foreclosure, may apply for payment of monies in Court or in the hands of the receiver; the monies being in respect of minerals, which are part of the inheritance.[3] And, if he obtains a judgment in that form; and subsequently to the certificate rents are received by the receiver; the principle of *Jenner-Fust* v. *Needham* [4] does not apply; and he is entitled to an immediate order for foreclosure absolute, and for payment of the rents, without any further account.[5]

d.—COVENANTS FOR TITLE.

Freedom from incumbrances.

Where the owner of land granted a lease of the mines, which bound the lessees so to work as to withdraw support from the surface; [6] and he subsequently sold the surface, excepting the mines, with power to work; and he covenanted for the right to grant, free from incumbrances; and subsequently to the sale the workings caused the surface to subside; it was held, that the covenant had been infringed.[7]

Quiet enjoyment.

Where the owner of land works out the mines; and he subsequently sells the land; and he covenants for quiet enjoyment; and the purchaser builds a house; and, in consequence of the workings, the house subsides; the covenant is nevertheless not infringed. Such a covenant would otherwise imply

[1] Dav. 2, Part 2, 433, n.

[2] Lewis *v.* Aberdare, &c., Co., 53 L. J. Ch. 741.

[3] See Coleman *v.* Llewellin, 34 Ch. D. 143, 146.

[4] 32 Ch. D. 582.

[5] Coleman *v.* Llewellin, 34 Ch. D. 143.

[6] See Shafto *v.* Johnson, 8 B. & S 252, n., cited *post*, p. 341, where the lease in question was the same.

[7] Taylor *v.* Shafto, 8 B. & S. 228.

a warranty, that the land was capable of being used for any purpose, or for any purpose not expressly excluded.[1]

Spoor *v.* Green.

In *Spoor* v. *Green*,[2] the owner of land, underneath which were coal and fire-clay, granted a lease of the coal, with incidental powers over the surface in respect of it, and also in respect of an adjoining colliery. The coal was soon afterwards substantially worked out. Subsequently, but during the subsistence of the lease, the owner, without fraud or concealment, sold the land; and he covenanted for title, quiet enjoyment, and freedom from incumbrances. There was not, subsequently to the sale, any working, or any exercise of the surface powers, and it did not appear that such powers were likely to be exercised. More than twenty years after the sale, but in consequence of the workings, the surface subsided. It was held (1) that the subsistence of the lease in respect to the unwrought coal, and the unexercised powers, did not constitute a breach of the covenants; and (2) that, if it did, the breach had taken place once for all, and that the remedy was, therefore, barred by the Statute of Limitations.[3] And the fact that the lessees had, subsequently to the sale, but within twenty years of action brought, entered the mines, and taken some fire-clay therefrom, was held (3) not to constitute a breach of the covenant for quiet enjoyment; the fire-clay having been included, not in the lease, but in the sale, and such taking having, therefore, been a trespass.[4] However, the fact that the lessees had, at the time of entry, also taken some loose fragments of coal from the mines, was held (4) to constitute a breach of the covenant for quiet enjoyment.[5]

e.—STAMPS.

Conveyances on sales are subject to an *ad valorem* duty of 1*l.* per 100*l.*[6]

[1] See Dennett *v.* Atherton, L. R. 7 Q. B. 327.

[2] L. R. 9 Exch. 99.

[3] *Per* Cleasby and Bramwell, BB., Kelly, C.B., dissenting.

[4] *Ib.*

[5] *Per* Kelly, C.B. See further, as to covenants for quiet enjoyment, *post*, pp. 261, 262.

[6] Stamp Act, 1891, Sched. See s. 54 and Finance Act, 1910, s. 73. Cf. the Act 55 Geo. 3, c. 184, and the decision thereunder of Phillips *v.* Morrison, 12 M. & W. 740.

f.—LAND TRANSFER ACTS AND RULES.

Meaning of land, mines, and minerals.

The first schedule to the Land Transfer Act, 1897,[1] provides, that, in the case of transfers of freehold and leasehold land under sections 30—33 and 35—38 of the Land Transfer Act, 1875,[2] "in the absence of anything to the contrary in the "register, or in the transfer, or (in the case of leasehold land) "in the lease, the word 'land' in these sections includes the "mines and minerals if parcel thereof." There is no definition of "mines" or "minerals" in the Acts; but the Land Transfer Rules, 1903, provide, that, unless there is something inconsistent in the context or in the Acts, "mines and minerals "include rights of entry, search, and user, and other rights "and reservations incidental to, or required for the purpose of "giving full effect to, the enjoyment of rights to mines and "minerals, or of property in mines and minerals." [3]

Liability of registered land to adverse mining rights.

Section 18 of the Act of 1875 provides that "all registered "land shall, unless under the provisions of this Act the contrary "is expressed on the register, be deemed to be subject to such "of the following liabilities, rights, and interests as may be for "the time being subsisting in reference thereto, and such "liabilities, rights, and interests shall not be deemed incum-"brances within the meaning of this Act; that is to say" (*inter alia*), "(4) Rights to mines and minerals; and (5) Rights "of entry, search, and user, and other rights and reservations "incidental to or required for the purposes of giving full effect "to the enjoyment of rights to mines and minerals, or of "property in mines or minerals." But the first schedule to the Act of 1897 amends this enactment by providing, that "these "sub-sections shall apply only to rights created previously "to the registration of the land or the commencement of this "Act." [4] The registrar is required to enter on the register notice of such liabilities when the abstract of title on first registration or on registration as qualified or absolute discloses their existence.[5]

[1] 60 & 61 Vict. c. 65.

[2] 38 & 39 Vict. c. 87.

[3] R. 1 (5).

[4] 1 January, 1898. For the effect of these provisions, see Brickdale and S. on the Acts, 2nd ed., 164, 165; Cherry and M. p. 50.

[5] See s. 18 of Act of 1875 as amended by first schedule to Act of 1897.

Registration where mines not severed from land—power to enter note.

Section 18 of the Act of 1875 also provides, that "where it "is proved to the satisfaction of the registrar that the right "to any mines or minerals is vested in the proprietor of land "registered or about to be registered, the registrar may register "such proprietor in the prescribed manner as proprietor of "such mines and minerals as well as of the land." And rule 213 of the Rules provides, that "where any mines and minerals "have been opened and worked by the proprietor of the land "or by his predecessors in title, or by any other person "claiming under him or them, and it does not appear on the "examination of title or from any other source that the owner-"ship of such mines and minerals is vested in any other person, "or in any other case where it is proved to the satisfaction "of the registrar that the right to any mines and minerals, "whether opened and worked or not, is vested in the pro-"prietor, the registrar may cause him to be registered as "proprietor of such mines and minerals by adding to the "property register a note to the effect that they are included "in the registration, and they shall thenceforth be considered "as forming part of and subject to the registered title of the "land unless otherwise noted in the register."

Registration where mines severed from land—generally.

Section 18 of the Act of 1875 also provides, that "where it "is proved to the satisfaction of the registrar that the right to "any mines or minerals is severed from any land registered or "about to be registered, the registrar may on the application "of the person entitled to any such mines and minerals register "him as proprietor of such mines and minerals in manner "hereafter in this Act mentioned, and upon such registration "being effected shall enter on the register of the land a reference "to the registration of such other person as proprietor of such "mines and minerals." And it further provides, that "where "the existence of any such liabilities, rights, or interests, as "are mentioned in this section, is proved to the satisfaction "of the registrar, the registrar may, if he think fit, enter on "the register notice of such liabilities, rights, or interests in "the prescribed manner." But with respect to the latter enactment the first schedule to the Act of 1897 provides, that "the power conferred on the registrar shall be exercised in "all cases where the abstract of title on first registration, or "on registration as qualified or absolute, discloses the existence

"of any such liabilities as are mentioned in sub-sections (4) "and (5)." Section 82 of the Act of 1875 provides, that "the registrar may register . . . the proprietor of any mines "or minerals where the same have been severed from the land, "in the same manner and with the same incidents in and with "which he is by this Act empowered to register land, or as near "thereto as circumstances admit."

Subsidiary provisions—duty to enter note.

The Rules contain further provisions on the same subject :— Rule 71 provides, that "application for the registration of ". . . mines and minerals severed from the land . . . shall be "made according to the Rules above prescribed in the case of "absolute and possessory titles respectively, and shall be "proceeded with in the same manner subject only to such "modifications as the nature of the case may require and the "registrar may approve."

Rule 74 provides, that "on the registration of mines and "minerals severed from the land, a plan showing as accurately "as is practicable the surface under which the mines and "minerals lie shall be deposited in the registry, together with "such other plans, sections, and further descriptions (if any), "as the registrar may deem necessary for the purpose of "identifying such mines and minerals, and also together with "full particulars of any appurtenant rights of access, or rights "incidental to the working of the mines and minerals, that may "be subsisting and intended to be entered in the register."

And Rule 214 provides, that "where it appears from the "documents or abstract of title furnished, or from the admission "of the proprietor of the land, or from any other source, that "all or any of the mines and minerals are severed from the "land, the registrar shall enter a note in the property register "that such mines and minerals are excepted from the regis-"tration."

Registration of mines apart from surface not compulsory.

Section 24 of the Act of 1897 provides, that "nothing in "this Act shall render compulsory the registration of the title "to . . . mines or minerals apart from the surface."

Contents of property register.

Rule 3 of the Rules provides, that "the property register "shall contain . . . such notes as have to be entered relating to "the ownership of the mines and minerals." [1]

[1] S. 9 of the Land Registry Act, 1862, contained provisions as to mines when an applicant thereunder sought registration. Temporary provision for

Transfer of registered land when registered—generally.

Sections 30, 31, 32, and 33 of the Act of 1875, prescribing the nature of the estate conferred by a transfer of freehold registered "land" when registered; and sections 35 and 38, prescribing the nature of the estate conferred by a transfer of leasehold registered "land" when registered; are amended by the first schedule to the Act of 1897, which provides, that "in "the absence of anything to the contrary in the register "or in the transfer, or (in the case of leasehold land) in the "lease, the word 'land' in these sections includes the mines "and minerals, if parcel thereof." [1]

Registered transfer of registered land without the mines, &c.

Rule 134 provides as follows:—"A transfer of land without "the mines and minerals shall be made by an instrument in "Form 28 in the first schedule hereto. A transfer of land "with certain specified mines and minerals shall be made by an "instrument in Form 29 in the first schedule hereto. A transfer "of land with the mines and minerals, except certain specified "mines and minerals, shall be made by an instrument in "Form 30 in the first schedule hereto. The transferee shall be "registered as proprietor of the land, with a note to the effect "that the mines and minerals (or that the mines and minerals "other than certain specified mines and minerals; or that "certain specified mines and minerals, as the case may be) are "excepted. The transferor shall, if entitled to the excepted "mines and minerals, be registered as the proprietor thereof, "with an absolute, qualified, good leasehold, or possessory "title, according to the circumstances of the case."

Registered transfer of registered mines without the land, &c.

Rule 135 provides as follows:—"A transfer of mines and "minerals without the land shall be made by an instrument in "Form 31 in the first schedule hereto. A transfer of certain "specified mines and minerals without the land shall be made "by an instrument in Form 32 in the first schedule hereto. "A transfer, without the land, of the mines and minerals, except

the operation of this Act was made by ss. 125, 126, of the Act of 1875.

[1] The schedule also amends ss. 36 and 37; but the latter sections were repealed by r. 67 of the rules. It is suggested in Cherry and M. on the Acts (p. 65), that, notwithstanding s. 77 of Rail. Cl. Act, 1845 (as to which see *ante*, p. 31), a transfer to a railway company of registered land, executed after 1897, would pass the mines and minerals without express mention. This would, however, it is submitted, be contrary to the rule, that a repeal of special Acts by general Acts will not usually be implied: see Kutner *v.* Phillips, 1891, 2 Q. B. at 272.

"certain specified mines and minerals, shall be made by an "instrument in Form 33 in the first schedule hereto. The "transferee shall be registered as the proprietor of the mines "and minerals transferred, with an absolute, qualified, good "leasehold, or possessory title, according to the circumstances "of the case: and a note shall be entered against the trans- "feror's title to the effect that the mines and minerals (or that "certain specified mines and minerals; or that the mines and "minerals other than certain specified mines and minerals, as "the case may be) have been transferred."

Where part only of land or mines transferred.

Rule 136 provides, that "where part only of the land or "of the mines and minerals under the land comprised in one "title is transferred, Forms 28 to 33 may be modified accord- "ingly."

Unregistered transfer of registered land.

Section 49 of the Act of 1875, prescribing the effect of unregistered dealings with registered land, is amended by the first schedule to the Act of 1897, which provides, that "this "section includes power to sever the mines and minerals from "the surface."

Forms for transfers.

Forms for transfers in accordance with the Acts and Rules, when mines and minerals are in question, are given in Forms 28 to 33 in the first schedule to the Rules.

Fees.

Where a transfer, by which mines and minerals are dealt with separately, is registered, the fee does not include the registration of the severed land or mines and minerals respectively, for which a separate fee is payable.[1] The fee for registration of mining leases is £5.[2]

[1] See r. 14 under Ld. Tr. Fee Order, 1903.

[2] See Ld. Tr. Fee Order, 1908, D. iii. 2.

CHAPTER XI.

LEASES.

Sect. 1.—PARCELS [1] AND LIBERTIES—CONSTRUCTION.

(*a*) *Parcels.*

Doubt as to intention to include mines.

Questions have sometimes arisen, whether, as a matter of construction, a lease has included particular mines or a particular mine.[2]

May be included although lessee disentitled to work.

Mines may be included in a lease, although the lessee may be disentitled to work them.[3] And where a lease contained a covenant to work mines until the whole should be worked out, "except the ribs or pillars which must necessarily or which the lessors might require to be left," it was held, that the lessee had a sufficient interest in the excepted ribs and pillars to be the subject of compensation under an Act giving compulsory purchasing powers.[4]

Difference between parcels and plan.

Where the description in the instrument is ambiguous; and the boundary is in consequence left uncertain; and a plan exists; the plan may sometimes be referred to for the purpose of ascertaining the real boundary.[5] Of course, however, it is impossible to delineate on a plan with absolute accuracy in all minute particulars the limits of mines or quarries. Accordingly, where a variance exists, or is said to exist, between the limits as described in the instrument in question and as delineated on a plan, the limits will be ascertained as far as possible by reference to the words of description in the instrument, and without reference to the plan.[6]

[1] It has been said, that in leases and similar documents the word "mine" is commonly used in a sense slightly wider than its primary one: see Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555, *per* Kay, J.; *ante*, p. 6.

[2] See Dugdale *v.* Robertson, 3 K. & J. 695; Carr *v.* Benson, 3 Ch. 524.

[3] Dugdale *v.* Robertson, *sup.*

[4] Swindell *v.* Birmingham Canal Navigation, 9 C. B., N. S. 241.

[5] Lyle *v.* Richards, L. R. 1 H. L. 222, *per* Lords Cranworth and Chelmsford, Lord Westbury dissenting. The plan was in itself slightly inaccurate, but this was held by the majority of the Lords to be immaterial.

[6] Taylor *v.* Parry, 1 Scott, N. R. 576. Cf. Brain *v.* Harris, 10 Exch.

(β) *Liberties.*

Liberty to work demised mines.

There is a clear distinction between a lease of lands, which happen to contain mines or quarries; and a lease, which embraces no other property than mines or quarries. In the former case, if the mines or quarries are new,[1] the lessee is, *primâ facie*, disentitled to work.[2] In the latter case, although they are new,[1] he is, *primâ facie*, entitled to work.[3] However, even in the latter case, his rights seem doubtful, if the mines or quarries are convertible to any other use than that of being worked.[4] And if the lease embraces both open [1] and new [1] mines or quarries, he may not, in the absence of express liberty, be entitled to work the new mines or quarries.[5] Every mining lease should, therefore, give the lessee express liberty to search for, work, and carry away the minerals. And the terms in which the liberty is given should be free from ambiguity. It has been held, as a matter of construction, that, although mines and minerals were included in a lease, the lessees were not entitled to work them.[6]

Liberty to sink pit.

A liberty to sink a pit creates an interest in the land, and runs with the land.[7] Such a liberty is frequently qualified by a proviso that the site of the pit shall be subject to the reasonable approval of the lessor. In such cases the burden is upon the lessor to show reasonable grounds for disapproval.[8] Where, before the sinking of the pit, a company purchase the site under the Lands Cl. Act, they may have to compensate the lessee for "injurious affection." [9]

Meanings of "instroke" and "outstroke."

The right of instroke is the right of conveying minerals from a demised mine to the surface through a pit or shaft in an adjoining mine. It is the converse right to that of outstroke; which is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the

908; Thomas *v.* Atherton, 10 Ch. D. 200, 201.

[1] As to open or new mines or quarries, see *ante*, pp. 55 *et seq.*

[2] See *ante*, pp. 89, 90, 91.

[3] See *ante*, pp. 90, 91: see also Coppinger *v.* Gubbins, 3 J. & L. 410.

[4] See Coppinger *v.* Gubbins, *sup.*

[5] See *ante*, p. 92.

[6] Dugdale *v.* Robertson, 3 K. & J. 695: cf. Attersoll *v.* Stevens, 1 Taunt. 183, 200. As to incidental or implied liberties, see *post*, pp. 451 *et seq.*

[7] Masters and G. W. R. Co., 1900, 2 Q. B. 677, 1901, 2 K. B. 84.

[8] See Masters and G. W. R. Co., 1901, 2 K. B. 84, at pp. 92, 94, 95.

[9] See S. C. The facts are stated *ante*, p. 167.

demised mine. There is also a third right; namely, that of conveying from an adjoining mine minerals through underground roads in the demised mine, but raising them elsewhere than at a pit in the demised mine. In the two latter cases the minerals worked from the adjoining mine are, in contrast with the demised minerals, commonly spoken of as "foreign" minerals.

Importance of right of instroke.

Where the lessee of a mine is also the lessee, or is the owner, of an adjoining mine, the importance to him of possessing the right of instroke is obvious; having regard to the expense which usually attends the sinking of a pit or shaft. It may, on the other hand, be extremely important to a lessor to be entitled to compel his lessee to sink a pit or shaft upon the demised premises. He may thus best ensure that, during the demise, the mine shall be worked to the fullest advantage; or that, at the end of the demise, it shall, in the event of any minerals then remaining unworked, be delivered up in a condition as favourable as possible to the continuance of the working. If he is not so entitled, the lessee will, if in a position to do so, probably work by instroke; and may, if not in such a position, prefer leaving the mine altogether unworked to undergoing, before working, the expense of sinking a pit or shaft.

Lessee entitled, *primâ facie*, to work by instroke.

The lessee of a mine is entitled, *primâ facie*, to work the minerals by instroke.[1] And he will not be deprived of this right, unless by clear and specific provisions. Thus, if he has obtained powers to make communications between the demised mine and adjoining mines, for the express purpose of working the adjoining mines by outstroke, and to work by outstroke accordingly; and, by means of these same communications, to work the demised mine by instroke; and has covenanted not to open any communications between the demised mine and the adjoining mines, and not to carry any minerals along any communications between the demised mine and the adjoining mines, except in pursuance of his powers; he cannot be prevented from making communications into an adjoining mine for the purpose of working, and by means

[1] Whalley *v.* Ramage, 10 W. R. 315; Lewis *v.* Fothergill, 5 Ch. 103; Jegon *v.* Vivian, 6 Ch. 742, 755, 756; *Re* Gerard and the L. & N. W. R. Co., 1895, 1 Q. B. 471, *per* Rigby, L.J. The L.J. in the passage cited calls this working by outstroke, but the context shows that he was in fact referring to the right of instroke.

thereof working, the demised mine by instroke. And it is immaterial, that such communications may not have been made for the primary purpose of working the adjoining mine by outstroke; or that, from the absence of shafts in the demised mine, it may never be possible to work the adjoining mine by outstroke. If, through breaches made in the barrier between the demised mine and an adjoining mine, he is entitled to carry the minerals of the demised mine, he is entitled to make the breaches for that very purpose.[1] However, his position may be different, if he is acting with *mala fides*, or unskilfully.[2]

Right of outstroke—when lessee is also lessee of land generally.

In some cases the lessee of a mine is also the lessee of the land generally; including therefore the surface, the shaft, and the means of underground communication between the shaft and the boundary. When this happens his right to work by outstroke is clear.

When lessee is not lessee of surface.

In other cases the lessee of a mine is not the lessee of the surface, but is the lessee of the shaft and the means of underground communication between the shaft and the boundary. When this happens, whatever his rights may be with respect to the shaft and the means of underground communication, he is not entitled, *primâ facie*, to carry foreign minerals from the pit's mouth across the surface.[3]

Right of underground carriage of foreign minerals.

In other cases the lessee of a mine is not the lessee of the non-mineral strata in which he has driven roads for the purposes of the demised mine. When this happens the position, it is submitted, is as follows:—He is not within the principle formerly laid down; that the lessee of a mine or quarry has, speaking generally, during the duration of his interest, as absolute a right to use as he thinks proper the mine or quarry, the containing chamber, and the space or vacuum which the working of the minerals creates, as if he were the owner in fee.[4] His acts are not confined within the ambit of the *solum* demised to him. He of necessity operates, or in part operates, in land not comprised in his demise. Nor can he justify his operations on the ground that he is entitled under a grant, express or implied,[5] to use the land in question as a way for the conveyance

[1] James *v.* Cochrane, 8 Exch. 556, 574, 575: cf. Lewis *v.* Fothergill, 5 Ch. 108, 109.

[2] See Lewis *v.* Fothergill, *sup.* 106, 110.

[3] See Jegon *v.* Vivian, 6 Ch. at p. 755. Cf. Mungle *v.* Young, 10 R. 901.

[4] *Ante*, p. 104.

[5] See as to ways of necessity, *post*, pp. 483, 484.

of the demised minerals. The grantee of a right of way for the conveyance of minerals from a particular mine cannot, *primâ facie*, use the way for the conveyance of minerals from any other mine.[1] If so, such a lessee is not entitled, *primâ facie*, to use the roads so driven for carrying foreign minerals.[2] This is consistent with the position in respect of water; which is subsequently referred to.[3] Considerable doubt, however, is thrown upon the correctness of the foregoing submission by *Batten Pooll* v. *Kennedy*.[4] The facts of this case have been already stated; and, for reasons already stated, it is submitted that the conclusion there reached cannot be supported.[5]

Wayleave rent for wrongful carriage.

If a lessee carries foreign minerals without having the right to do so, the lessor may obtain compensation by way of wayleave rent.[6]

Lessee entitled to use mine for drainage.

A lessee is entitled, *primâ facie*, to permit the demised mine to receive, by the natural action of gravitation, the drainage of an adjoining mine.[7] And if he makes, or permits to be made, in the adjoining mine any conduits or channels, not for the purpose of artificially conducting water through the demised mine, but in the ordinary and proper course of working the adjoining mine; and water flows along such conduits or channels into the demised mine; he is, *primâ facie*, free from liability.[8] The position is different if he makes a channel "in order that the water might pass through."[9]

Or ventilation.

A lessee is entitled, *primâ facie*, to use, or permit to be used, the demised mine for the purpose of ventilating an adjoining mine.[10]

Sect. 2.—RENT AND ROYALTY.

(*a*) *Mine or Quarry.*

Desirability of reserving both dead rent and royalty.

The lessor of a mine or quarry should always stipulate for a combination in the *reddendum* of fixed or dead rent, and of

[1] See *post*, p. 476.

[2] This appears to have been the view of the Inner House in the Scotch case of Mungle *v.* Young, 10 R. 901. The observations of Rigby, L.J., in *Re* Gerard and the L. & N. W. R. Co., 1895, 1 Q. B. 471, refer to instroke, not to outstroke, see *ante*, p. 238, n. [1].

[3] See *post*, p. 257; see also *post*, pp. 507, 508, and cf. *post*, pp. 508, 509 *et seq.*

[4] 1907, 1 Ch. 256.

[5] *Ante*, pp. 3, 4.

[6] See *post*, pp. 486, 487.

[7] Jegon *v.* Vivian, 6 Ch. 758.

[8] *Ib.* See also *post*, pp. 510, 511.

[9] Jegon *v.* Vivian, 6 Ch. at p. 758.

[10] *Ib.* 6 Ch. 758, 759.

royalty.[1] He will, by this means, ensure the receipt, on the one hand, of a yearly sum of a specified amount, however unproductive the demised property may prove; and, on the other hand, of a sum proportionate to its productiveness, if it prove productive.[2]

Dead rent when reserved usually payable under all circumstances.

Where a dead rent is reserved, it is payable, *primâ facie*, although the demised property be never actually worked:[3] or although it prove not to be worth the expense of working; whether, generally, on account of the speculative character of such property;[4] or, specifically, on account of accidents,[5] or even of unknown faults. Mines are notoriously liable to faults; and the doctrine of *caveat emptor* may therefore, in the latter case, be with peculiar propriety applied for the benefit of the lessor.[6] And it is, *primâ facie*, payable, where the demised property is not worth the expense of working, although the lessee may have been authorised to deduct the royalty out of it;[7] or even to determine the lease on the minerals being worked out.[8] And the mere fact, that the rent is not in terms reserved, "whether the minerals be worked or not," is immaterial.[9] And the lessee cannot, of course, escape payment by offering to pay the royalty for all the minerals, or all the remaining minerals.[10] The rent is also payable, *primâ facie*, after the exhaustion of the demised property.[11]

Even where mine non-existent unless where mutual mistake.

And a dead rent is payable, *primâ facie*, even although the

[1] "Royalties," in the strict sense of the word, means "regalitates" or Crown rights (see A.-G. of Ontario *v.* Mercer, 8 A. C. 777, 778); and, as such, it was held in that case to include escheats to the Crown. In connection with mining grants and leases, the word is used to signify that part of the reddendum, which is variable, and depends on the quantity of minerals gotten (*ib.* 777).

[2] See Jegon *v.* Vivian, L. R. 1 C. P. 34; Aldam's Settled Estate, 1902, 2 Ch. 60, 64.

[3] Jones *v.* Reynolds, 7 C. & P. 335; Jegon *v.* Vivian, L. R. 1 C. P. 34, 6 Ch. 757.

[4] Haywood *v.* Cope, 25 Beav. 140; Strelley *v.* Pearson, 15 Ch. D. 113, 119. Cf. the Scotch law as to unworkability to profit, as illustrated in Gowan *v.* Christie, L. R. 2 Sc. & D. 273.

[5] Phillips *v.* Jones, 9 Sim. 519; Mellers *v.* Devonshire, 16 Beav. 252.

[6] Ridgway *v.* Sneyd, Kay, 627, 635. See also Mellers *v.* Devonshire, *sup.* 256, 258; Jervis *v.* Tomkinson, 1 H. & N. 208.

[7] Ridgway *v.* Sneyd, *sup.* 636.

[8] Phillips *v.* Jones, *sup.* 519.

[9] Ridgway *v.* Sneyd, *sup.* 627.

[10] Phillips *v.* Jones, *sup.*; Mellers *v.* Devonshire, *sup.* 255.

[11] R. *v.* Bedworth, 8 East, 387; Bute *v.* Thompson, 13 M. & W. 487; Milne *v.* Taylor, 16 L. T. 172; Jegon *v.* Vivian, L. R. 1 C. P. 34; Clifford *v.* Watts, 5 *ib.* 587, 588.

mine supposed to be demised prove to be non-existent, if the bargain between the parties is, in substance, that the lessee shall take his chance of finding the minerals. For in such a case a warranty by the lessor, that the mine exists, will not be implied.[1] It has, however, been said, that, if in consequence of former and unknown workings, the minerals supposed to have been demised had all been previously gotten, the payment could probably not be exacted; the doctrine of common mistake being, in such a case, probably applicable for the relief of the lessee.[2]

Fraud to evade payment.

Where a lessee had covenanted to pay a dead rent commencing on the first quarter-day after a specified quantity of coal had been dug, he was not allowed to escape the payment by fraudulently abstaining from completing the digging of that quantity.[3]

Covenants as to working are unsafe substitute.

Where a dead rent is not reserved, the lessor cannot rely, as a safe substitute, upon a covenant by the lessee to work in a workmanlike manner;[4] or even upon covenants to take the usual steps forthwith to win the minerals; or to work diligently and regularly; or to get a specified quantity of minerals in each year of the demise.[5]

Different kinds of royalties.

There are different kinds of royalties. One is a tonnage royalty. Another is an acreage rent for every acre, and so in proportion for any greater or less quantity, that may be gotten in any year of the demise. Another is a footage rent for every foot thick per acre, and so in proportion for any greater or less thickness, that may be so gotten. Another is a reservation of a proportionate part of the mineral in specie. Another is a rent according to the quantity of minerals sold. And another is a rent rising and falling with prices according to a sliding scale.

Reservation in specie.

Where a proportionate part of the mineral itself is reserved,

[1] Jefferys *v.* Fairs, 4 Ch. D. 448; where, however, evidence was given to show that the search was insufficient. See also Jervis *v.* Tomkinson, 1 H. & N. 208. In Scotch law a lessee is entitled to abandon a mining lease, when the mine turns out to be non-existent, or there is a total destruction or exhaustion of it: Gowan *v.* Christie, L. R. 2 Sc. & D. 273. The civil law doctrine, upon which the Scotch law is founded, was the same.

[2] Ridgway *v.* Sneyd, Kay, 627, 635. See also Bulli Coal Co. *v.* Osborn, 1899, A. C. at p. 354.

[3] Green *v.* Sparrow, 3 Swanst. 408, n.

[4] Jegon *v.* Vivian, 6 Ch. 757, 758.

[5] As to the effect of such covenants, see *post*, pp. 247 *et seq.*

and the mine is not a coal mine, the lessor is, in respect of the reservation, rateable to the poor, and to local rates, as being in receipt of a portion of the mine; and the lessee is exempt.[1]

Questions of construction.

Questions have arisen, principally as matters of construction, whether royalty was payable on dressed or undressed ore;[2] whether royalty was payable on the amount of coals sold, or on the amount of money actually received;[3] as to the effect of a reservation of royalty in respect of sums which the minerals would sell for at the pit's mouth;[4] as to a covenant to supply lime implying a covenant to burn it;[5] as to the effect of a covenant to deliver coal for the lessor's use, when there was power to determine on the minerals being worked out, and where coal still remained in the mine, although it was not workable at a profit;[6] and whether, when a lease comprised more than one seam, and reserved a rent after deducting "all expenses of winning," the word "winning" ought to be read *separatim* as to each seam, and what items the lessee was entitled to deduct, and on what basis.[7]

Exemptions.

Questions have also arisen under exemption clauses as to the liability to pay for coal consumed in the working.[8]

Common mistake as to liability for rent.

The rights of parties are not affected merely because payments have for a considerable time been made and received upon a particular footing, if such payment and receipt are due to a common mistake as to the nature or extent of the liability to pay.[9]

Average clause.

An "average" or "shorts" clause is usually inserted. This enables the lessee, in the event of his failing in any year to raise such a quantity of minerals as would produce royalties equivalent to the dead rent, to make up the deficiency in any

[1] See R. *v.* Baptist Mill Co., 1 M. & S. 612; R. *v.* St. Austell, 5 B. & Al. 693; R. *v.* Todd, 12 A. & E. 816: see also *post*, p. 580.

[2] See Morley *v.* Yorkshire Lead Mines, W. N. 1890, p. 47.

[3] Edwards *v.* Rees, 7 C. & P. 340.

[4] Clifton *v.* Walmesley, 5 T. R. 564: see also Gerrard *v.* Clifton, 7 T. R. 676.

[5] Shrewsbury *v.* Gould, 2 B. & Al. 487.

[6] Cartwright *v.* Forman, 7 B. & S. 243. The decision would have been different if no coal had remained in the mine: *ib.* Cf. Clifford *v.* Watts, L. R. 5 C. P. 577, cited *post*, p. 250.

[7] Rokeby *v.* Elliot, 7 A. C. 43, partly reversing S. C. 13 Ch. D. 277; which affirmed S. C. 9 Ch. D. 685.

[8] Senhouse *v.* Harris, 5 L. T., N. S. 635; Hodgkinson *v.* Crowe, 10 Ch. 622 (p. 623).

[9] Clifton *v.* Walmesley, 5 T. R. 564: see also Gerrard *v.* Clifton, 7 T. R. 676; Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256; and cf. N. E. R. Co. *v.* Hastings, 1900, A. C. 260.

subsequent year or years, or any subsequent specified years of the term, without being obliged to pay royalty in respect thereof.[1] Questions of construction have arisen upon the effect of such clauses.[2]

(β) *Liberties.*

Penal rent.

Where a penal rent is agreed upon, care should, in framing the reservation, be taken to ensure its being treated as liquidated damages, and not as a penalty.[3]

Wayleave rent— "through, over, or under."

Questions have arisen upon the effect of reservations of wayleave rent.[4] Where the words used were "through, over, or under," it was contended, but without success, that "through" was the governing word; and that the reservation could not have been intended to apply to minerals, which were brought on the demised land for a temporary purpose, and then removed; but only to minerals, which traversed the land in the sense of entering at one end, and going out at the other.[5]

SECT. 3.—COVENANTS BY LESSEE.

(α) *Covenant to pay Rents.*

Action on covenant.

Notwithstanding section 42 of the Act 3 & 4 Wm. 4, c. 27, an action on the covenant to pay may be brought at any time within twenty years.[6]

Action for account.

A lessor was always entitled, even before the Jud. Acts, to a remedy in equity for an account. And this was irrespective of whether he was also entitled to an injunction: mining operations having been regarded as a species of trade;[7] and the rule "no injunction, no account," having, therefore, been deemed inapplicable.[8]

[1] There is no part of a lease, over which mining engineers expend more labour and ingenuity; with the result that average clauses are of infinite variety and complication.

[2] Bishop *v.* Goodwin, 14 M. & W. 260; Clayton *v.* Penson, W. N. 1878, p. 158.

[3] See *Re* Mexborough and Wood, 47 L. T. 516.

[4] Senhouse *v.* Harris, 5 L. T., N. S. 635; G. W. R. Co. *v.* Rous, L. R. 4 H. L. 650.

[5] G. W. R. Co. *v.* Rous, L. R. 4 H. L. 650.

[6] Darley *v.* Tennant, 53 L. T., N. S. 257.

[7] Jesus Coll. *v.* Bloom, Amb. 55, 56, 3 Atk. 262, 264; Pulteney *v.* Warren, 6 Ves. 73, 89; Jefferys *v.* Smith, 1 J. & W. 302; Parrott *v.* Palmer, 3 M. & K. 632, 640, 642: see also *ante*, p. 95, n. [5], and other cases there cited.

[8] Jesus Coll. *v.* Bloom, *sup.*; Pulteney *v.* Warren, *sup.*; Parrott *v.*

An account does not lie against the equitable owner of a lease, who has entered into possession and worked. According to some decisions an account lies; on the ground, either that he has worked under the authority of the lease, and is subject, therefore, to the payment which it imposes; or that he must be treated as a trespasser, and is liable to account as such.[1] But there are decisions of more authority directly to the contrary.[2]

No account against equitable owner.

In a successful action to recover rents and royalties, interest at 4*l.* per cent. is also recoverable from the date of the writ.[3]

Interest.

(β) *Covenant to pay Taxes, Rates, &c.*

Effect will of course be usually given to a covenant by a lessee to pay taxes, rates, &c. But a covenant to pay rates in respect of mines other than coal mines is qualified by sections 8 & 9 of the Rating Act, 1874.[4] And under section 20 (4) of the Finance (1909—10) Act, 1910, the liability to mineral rights duty is on the immediate lessor, notwithstanding any contract to the contrary, whether made before or after the passing of the Act.[5]

Covenant sometimes of qualified or no effect.

(γ) *Covenants to sink, win, or raise.*

Consistently with the principle, that a lessee is entitled, *primâ facie*, to work by instroke,[6] he is not bound, *primâ facie*, in order to get the minerals, to sink pits or shafts.

Lessee not bound, *primâ facie*, to sink pits.

And he will not incur liability by not sinking a pit or shaft, on the mere ground that, at the date of the lease, he was not the owner or lessee of any adjoining mine:[7] or that both lessor and lessee contemplated as possible or probable the sinking of pits or shafts:[8] or that the lessee is empowered to

Intention to bind must be clearly shown.

Palmer, *sup.*; Ernest *v.* Vivian, 33 L. J. Ch. 517, 519; Wright *v.* Pitt, 12 Eq. 416. See, however, Geast *v.* Barker, 2 B. C. C. 61.

[1] See Wright *v.* Pitt, 12 Eq. 408, 417. See also Clavering *v.* Westley, 3 P. Wms. 402; G. W. R. Co. *v.* Rous, L. R. 4 H. L. 650.

[2] Walters *v.* North Coal Co., 5 De G. M. & G. 629; Cox *v.* Bishop, 8 *ib.* 815; Ramage *v.* Womack, 1900, 1 Q. B. 20, 121.

[3] Newton *v.* Nock, 43 L. T., N. S. 197; under the Act 3 & 4 Will. 4, c. 42, s. 28.

[4] See *post*, p. 581.

[5] See *post*, pp. 564, 565.

[6] See *ante*, p. 238.

[7] Jegon *v.* Vivian, 6 Ch. 742, 756.

[8] James *v.* Cochrane, 7 Exch. 177, 8 Exch. 556, 577; Jegon *v.* Vivian, 6 Ch. 754, 756.

sink a pit or shaft, and to bring the minerals to the surface, and to make roads, and to carry the minerals over the surface : [1] or that he has covenanted not to sink a pit or shaft except in particular parts of the demised property : [2] or that the lease contains a provision, that the payment of a dead rent shall not commence for a specified number of years, if, within that time, the necessary steps are taken, *bonâ fide*, to win and work : [3] or that, by not sinking a pit or shaft, much of the mineral will necessarily be wasted : [4] or that, if, instead of sinking a pit, the mine is worked by instroke, it will be exposed either to the peril of the water naturally accumulating within its own area being insufficiently drained, or to the peril of receiving an influx of water from the adjoining mine ; no injury from either cause having actually taken place : [5] or that the lessee has covenanted to work "uninterruptedly, efficiently, and regularly according to the usual or most approved practice ;" and that the working cannot be carried on to the fullest advantage unless a pit or shaft is sunk : [6] or that he has covenanted to work in a "proper and workmanlike manner :" at all events in districts where working by instroke is usually practised : [7] or that the lease reserves the liberty of entering the demised property to view its condition ; and that no entry can be made unless a pit is sunk : [8] or that it contemplates the surrender, at its expiration, of the demised property in such a state as to allow of the lessor working the remaining minerals ; and that such working cannot immediately, or cannot profitably, be undertaken, if a pit has then to be sunk to reach them.[9] *A fortiori*, he will not incur such liability where the lease empowers him to work by outstroke ; any argument founded upon injury to the demised property by breaking the barrier being, in such a case, inapplicable.[10]

[1] Lewis *v.* Fothergill, *sup.* 104 ; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 539, 546 ; Jegon *v.* Vivian, *sup.* 755.

[2] Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552.

[3] Lewis *v.* Fothergill, 5 Ch. 103 : cf. James *v.* Cochrane, 8 Exch. 556.

[4] Jegon *v.* Vivian, 6 Ch. 742 : see the argument.

[5] Lewis *v.* Fothergill, *sup.*

[6] Wheatley *v.* Westminster Brymbo Coal Co., *sup.* 538, 548, 549.

[7] Lewis *v.* Fothergill, *sup.* 103, 110 ; Jegon *v.* Vivian, *sup.* 756.

[8] Jegon *v.* Vivian, *sup.* 742 : see the argument.

[9] Jegon *v.* Vivian, *sup.* 754—757.

[10] See Lewis *v.* Fothergill, *sup.* 108, 109 : cf. James *v.* Cochrane, 8 Exch. 556 ; *ante*, pp. 238, 239.

A covenant to "work" may, however, oblige the lessee to sink a pit, if no other mode of working is possible.[1] Covenant to "work" may show intention.

Where a lessee has entered into a specific covenant to sink a pit or shaft, he will be liable for not performing it; although its performance may involve, so far as the actual working of the mine is concerned, a useless application of time, labour, and expense.[2] Where, however, a lessee had covenanted to proceed forthwith to sink pits "as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary;" and he ascertained, upon trial, that there were, in fact, no coals, or none worth the expense of getting; it was held, that he was not bound to sink.[3] The measure of damages for non-performance of a covenant to sink is the expense the lessor would be put to in himself sinking.[4] Express covenant to sink.

A covenant to "win" a mineral means, *primâ facie*, to reach it, and put it in such a condition, that it may be continuously worked in the ordinary way.[5] "A coal-field is won when full practicable available access is given to the coal-hewers."[6] Meaning of "win."

A covenant to "open" means, *primâ facie*, to "win."[7] A covenant to "raise" means, *primâ facie*, to get or win; not to bring to the surface.[8] Meanings of "open" and "raise."

In a covenant "fairly, duly, and honestly" to win, the adverbs must be read as adding to, and not detracting from, the obligation.[9] "Fairly, duly, and honestly."

(δ) *Covenants to work.*

A lessee cannot be compelled to work on the mere ground, that the mine has been included in the demise, and a royalty No obligation to work in absence of covenant.

[1] James *v.* Cochrane, 7 Exch. 178, *per* Parke, B.

[2] Jervis *v.* Tomkinson, 1 H. & N. 195: cf. James *v.* Cochrane, 7 Exch. 170.

[3] Hanson *v.* Boothman, 13 East, 22: cf. the effect of covenants to work, *infra*.

[4] See Pell *v.* Shearman, 10 Exch. 766: see p. 769.

[5] Lewis *v.* Fothergill, 5 Ch. 106, 111.

[6] Rokeby *v.* Elliot, 13 Ch. D. 279, *per* James, Baggallay, and Thesiger, L.JJ. See also S. C. 9 *ib.* 639, *per* Fry, J. See also *ante*, p. 243.

[7] Eckersley *v.* Wigan, &c., Co., 102 L. T. at p. 269.

[8] Senhouse *v.* Harris, 5 L. T., N. S. 635; Kinsman *v.* Jackson, 42 *ib.* 80.

[9] Watson *v.* Charlesworth, 1905, 1 K. B. 74, affirmed Charlesworth *v.* Watson, 1906, A. C. 14. Cf. the position under a covenant to work, *post*, p. 251.

reserved in respect of it ;[1] or, apparently, on the mere ground that he has covenanted, "in working it," to do certain things.[2] And where a dead rent and a royalty were reserved ; and the lessee covenanted to work in a "workmanlike manner" all mines "which then had been or thereafter, during the continuance of the demise, should be discovered or opened ;" and an action was brought upon the covenant ; and the lessee pleaded, that, before the demise, the mines had never been worked, and that, during the demise, he had never in fact worked them ; it was, on demurrer to the plea, held, that he had not infringed the covenant.[3]

Covenant obliging continuous working.

It follows, that a lessee cannot be compelled to work continuously, on the mere ground that the parties could have had no other intention than that the property should be worked ;[4] or that a royalty has been reserved ;[5] or that the lessee has covenanted to work in a "proper and workmanlike" manner.[6] Of course, however, if a dead rent has been reserved in addition to a royalty, and the lessee has covenanted to work constantly and effectually ; and, after an interval, he discontinues the working altogether ; he may be made liable on the covenant, although he pays the dead rent.[7] A covenant to work "at all times" two or more seams of coal is frequently incapable of literal performance.[8]

[1] Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 539, 554 ; Abinger *v.* Ashton, 17 Eq. 370. See also James *v.* Cochrane, 7 Exch. 170. See, as to Scotland, Convery *v.* Summerlee Iron Co., 12 R. 191.

[2] See James *v.* Cochrane, *sup.* 179.

[3] Quarrington *v.* Arthur, 10 M. & W. 335.

[4] Jegon *v.* Vivian, 6 Ch. 757.

[5] See Crang *v.* Adams, 5 B. P. C. 588 ; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 538, 539 ; Jegon *v.* Vivian, *sup.* 742, 746. The two latter cases must apparently be taken to overrule Sharp *v.* Wright, 28 Beav. 150 ; where the reservation of a royalty, payable quarterly, was held to imply a covenant to commence working immediately, and to proceed continuously.

[6] Jegon *v.* Vivian, *sup.* 757 : cf. Mellers *v.* Devonshire, 16 Beav. 257.

[7] See Whitehead *v.* Bennett, 9 W. R. 628, *per* Kindersley, V.-C. ; Simpson *v.* Ingleby, 20 W. R. 993, *per* James and Mellish, L.JJ. ; Kinsman *v.* Jackson, 42 L. T. 80, *per* Jessel, M.R. ; affirmed, *ib.* 558. See also Quarrington *v.* Arthur, 10 M. & W. 335 ; Jervis *v.* Tomkinson, 1 H. & N. 195. In Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 538, 550, 551, 553 ; and Simpson *v.* Ingleby, 20 W. R. 588 ; Malins, V.-C., expressed his opinion, that a lessee could not, under the circumstances mentioned in the text, be made liable ; and that such a covenant as is there mentioned only obliged him, in the event of his working, to work constantly and effectually ; but did not oblige him to work at all, if he did not choose to do so. This opinion cannot, however, be supported.

[8] Abinger *v.* Ashton, 17 Eq. 370 :

Eckersley *v.* Wigan Coal and Iron Co.

Where a lease comprised ten mines, and was granted for 21 years; and the lessees covenanted that they would "immediately or as soon as may be after this demise proceed to open and get the said several mines hereby demised, and from time to time and at all times . . . fairly and orderly, and in regular and workmanlike manner, and according to the customary and usual method of working mines of the same description in the neighbourhood work the same mines respectively with effect and without voluntary intermission or delay;" and the lease contained powers to sink pits; and do other acts, which, if they had been done, would have enabled the lessees to work out the mines during the term; and the lessees did not exercise such powers; and they only worked two of the demised mines; and they altogether ceased to work the demised mines five years before the end of the term; and they so acted merely because the exercise of the powers would have involved them in expense, and they preferred to work adjacent mines which were also in lease to them; it was, in an action brought after the expiration of the term, held that the lessees had broken the covenant.[1] It was considered that the covenant imposed an obligation upon them to proceed to open and get *each* of the demised mines as soon as might be after the commencement of the lease, having regard to the character, stratification and sequence of the mines; and that their obligations or powers as regards the adjacent mines; and the advantage to them of working the adjacent mines in comparison with the demised mines; were irrelevant considerations. It was observed in the same case that a covenant to "proceed to" open is less onerous than an unqualified covenant to open.[2]

Measure of damages for breach.

The measure of damages in such a case is a sum equal to the rent which would have been received if the lessees had worked the coal wrongly left unworked, less the rent which such coal would probably produce when a future lessee was found, discounted to present value. But the lessor in such a case is not entitled to interest from the date when the coal should have been worked to the date of the judgment.[3]

cf. Charlesworth *v.* Watson, 1906, A. C. 14.

[1] Eckersley *v.* Wigan Coal, &c., Co., 103 L. T. 468; affirming the decision of Eve, J., and the Court of Appeal, 102, *ib.* 264.

[2] *Per* Buckley, L.J., p. 270.

[3] Eckersley *v.* Wigan Coal, &c., Co.,

Acquiescence by lessor in breach.

Acquiescence by a lessor in the breach of a covenant to work continuously may not disentitle him to bring an action for ejectment.[1] But it may oblige him, before doing so, to give the lessee a reasonable time for restoring the plant and machinery on the mine to a working condition.[2]

Covenant to raise specified quantity.

If a lessee enters into a covenant to produce a specified quantity of minerals, whether they exist in the mine or not; or to pay the stipulated royalty as if they had existed; he will not be allowed to escape performance on the ground that the minerals are difficult to get.[3] Nor will he, although there never was that quantity in the mine, be allowed to allege impossibility of performance at the time of entering into the covenant; whether occasioned by the act of a third party, or by the act of God, or otherwise.[4] Of course, however, if a lessee covenants to produce a specified quantity of minerals in a specified time, and to pay royalties thereon; or, in the alternative, to pay a specified sum by way of rent; and he pays the rent; he is not liable under the covenant to work.[5] And if he, in fact, only covenants to raise such minerals as it is possible to find under the land in question at the specified rate of payment, he will not be bound by the covenant, unless the specified quantity existed in the mine at the time of the demise.[6] But, in such a case, the burthen may lie upon him of showing, that he searched for the minerals; and searched so effectually, that they must have been found, if they had existed.[7]

Qualified covenant to work.

It is seldom, however, that a lease contains an unqualified covenant to work continuously, or to raise a specified quantity. The covenant usually obliges some working, but qualifies its extent.

Such lessee not entitled to abandon.

Where a lessee has entered into an absolute covenant to "carry on, get, and work" a mine; and has abandoned it; he will, independently of his liability (if any) on account of

102 L. T. 264, *per* Eve, J. The decision as to the measure of damages is not reported.

[1] Whitehead *v.* Bennett, 9 W. R. 626, where there had been an acquiescence for fifteen years.

[2] *Ib.*

[3] Jervis *v.* Tomkinson, 1 H. & N. 195.

[4] *Ib.*; Clifford *v.* Watts, L. R. 5 C. P. 577, 583, 586.

[5] Foley *v.* Addenbrooke, 13 M. & W. 174.

[6] Clifford *v.* Watts, *sup.*: cf. Cartwright *v.* Forman, 7 B. & S. 243.

[7] Clifford *v.* Watts, *sup.* 585, 588.

rent or royalty, be liable, *primâ facie*, on the covenant; although its performance would have involved a useless expense.[1] A covenant to work china clay in the most proper and effectual manner with a reasonable number of able-bodied men kept employed on the works at all reasonable and usual working times; and so that the china clay may be "raised, washed, and made merchantable as speedily as practicable;" has been held to be infringed by omitting for several weeks to employ the men in the raising, although during the whole of such time they were employed in the washing and making merchantable.[2]

"Fairly and regularly"—"careful, proper, and workmanlike"—"fairly, duly, and honestly."

Where a lessee covenanted that mines should be "fairly got, and regularly worked out, to as little disadvantage as possible" to the lessor, it was held, that there was an imperative obligation to get fairly and work regularly, and that such obligation was not qualified by the subsequent words.[3] So where there was a covenant to "carry on, get, and work in a careful, prudent, proper, and workmanlike manner," it was held, that the obligation to carry on, get, and work was not qualified by the subsequent words.[4] So where there was a covenant "fairly, duly, and honestly to work and get . . . in a proper and workmanlike manner," it was held, that the adverbs must be read as adding to, and not detracting from, the obligation.[5] "Why you should say, that, because you are obliged to do a thing well, you are absolved from doing it at all, passes my conception."[6] And if in such cases it is permissible, in construing the covenant, to look at the nature of the transaction, the fact that the dead rent is trivial may be a reason for construing it in favour of the lessor.[7]

"Consistent with means of sale"—"proper mixture."

Questions have arisen as to the effect of such an expression,

[1] Jervis *v.* Tomkinson, 1 H. & N. 195: cf. James *v.* Cochrane, 7 Exch. 178, 179.

[2] Kinsman *v.* Jackson, 42 L. T., N. S. 80, 558: cf. Doe *v.* Bancks, 4 B. & Al. 403.

[3] Walker *v.* Jeffreys, 1 Ha. 341: see pp. 343, 351, 352.

[4] Jervis *v.* Tomkinson, 1 H. & N. 195.

[5] Watson *v.* Charlesworth, 1905, 1 K. B. 74; Charlesworth *v.* Watson, 1906, A. C. 14.

[6] Charlesworth *v.* Watson, *sup.* 17, *per* Lord Robertson.

[7] *Ib.* 15, 16, *per* Lord Halsbury. It has been decided in Scotland, that a lessee, who was bound to work "fairly and properly," with liberty to adopt any mode of working he might deem most advantageous, was liable for improper working which wrecked the mine, although it was not dishonest working: Jackson *v.* Dixon, 3 F. 782.

in a covenant to work clay, as "consistent with the means of sale;" [1] and, in a covenant to work ironstone, as "unless" the ironstone would not, with a "proper mixture" make good iron.[2]

"Workable."

A frequent covenant in a lease is to work so long as the mine is "workable," or is "fairly workable." The meaning of these expressions has not been satisfactorily settled by decision. It has been held, that, under the words "fairly workable," lessees were not obliged to work at a dead loss.[3] And it has been said, that "fairly wrought" means that which can be "fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense." [4] However, the correctness of the latter definition has been questioned; [5] and the actual decision does not seem to be consistent with it. In another case,[6] where a lease contained the words "coal seams workable as coal seams," the Court of Appeal apparently considered, that the words referred to profit. Whatever be the conclusion which ought to be drawn from these cases, it is believed, that at the present day, at all events in the mining world, "unworkable" does not mean "physically unworkable," but "unworkable without serious loss over a considerable period of time."

"Proper and workmanlike manner."

A covenant to work in a "proper and workmanlike manner" does not mean, *primâ facie*, in such a manner only as shall be most advantageous for the lessor. It means, *primâ facie*, in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.[7]

Expert evidence as to meaning of covenant.

Sometimes evidence will be admitted to show the understanding amongst miners as to the particular language employed. Thus, where lessees had covenanted, that they would, by a certain time get all the coal "not deeper than

[1] Newton *v.* Nock, 43 L. T. 197.

[2] Foley *v.* Addenbrooke, 13 M. & W. 174.

[3] Jones *v.* Shears, 7 C. & P. 346.

[4] Griffiths *v.* Rigby, 1 H. & N. 241, see *post*, p. 266.

[5] Cartwright *v.* Foreman, 7 B. & S. 247.

[6] Carr *v.* Benson, 3 Ch. 524.

[7] Lewis *v.* Fothergill, 5 Ch. 108, *per* Lord Hatherley. In Eadon *v.* Jeffcock, L. R. 7 Ex. 393 (*per* Cleasby and Martin, BB.), it was said that lessees, even in the absence of covenant, are bound to work in the usual and approved mode of working in the district.

or below the level of " the bottom of the A. mine under a certain point at the surface, it was held that evidence was admissible to show, whether, according to such understanding, the expressions used referred to a perpendicular depth below the surface, or to the inclination of the strata and the power of drainage.[1] So the evidence of experts will be admitted to explain the local meaning of a covenant to work in a " proper and workmanlike manner." [2]

Lessee offering to pay not obliged to work.

Where a lessee has covenanted to work or pay for a specified quantity; and faults are found, or unavoidable accidents happen, whereby it is impossible to work except at a ruinous expense; he will not be allowed to plead the faults or accidents as an absolute bar to all relief against him on his covenant.[3] But in such a case the lessor will not be allowed to enforce the covenant, if the lessee offers to pay the royalty on all the minerals capable of being worked.[4] If the lessor can get everything he has contracted for, he will not, in addition, be allowed to compel the lessee to be an expense which will benefit no one.[5]

Mines drowned out or non-existing—onus of proof.

Where a lessee abstains from working on the ground, that the minerals, which he has covenanted to work have been drowned out, he will be free from liability, if the drowning be not attributable to any wilful default of his own.[6] But the burden lies upon him to prove that it was not so attributable.[7] And where a lessee abstains from working on the ground, that the minerals, which he has covenanted to work, do not exist, the burden lies upon him to prove the fact.[8]

Covenant as to mode of working.

Covenants to work have two objects. One deals with the extent of the working, the other with its mode.

Several seams—whether covenant obliges simultaneous working.

Where three seams were comprised in the same lease; and the lessees covenanted to work at all times the said seams with their utmost skill and ability, in the best and most

[1] Clayton *v.* Gregson, 5 A. & E. 302: cf. Brain *v.* Harris, 10 Exch. 908.

[2] Lewis *v.* Fothergill, 5 Ch. 107, 110, *per* Lord Hatherley.

[3] Morris *v.* Smith, 3 Dougl. 279.

[4] Smith *v.* Morris, 2 B. C. C. 311 (for the form of the decree in which see p. 314): see also Phillips *v.* Jones, 9 Sim. 519; Mellers *v.* Devonshire, 16 Beav. 258; Ridgway *v.* Sneyd, Kay, 632—634, 637.

[5] Ridgway *v.* Sneyd, *sup.* 635, *per* Wood, V.-C.

[6] Walker *v.* Jeffreys, 1 Ha. 341: see p. 352.

[7] *Ib.*: see pp. 357, 358.

[8] Watson *v.* Charlesworth, 1905, 1 K. B. 74.

effectual manner, to the best advantage, and according to the common mode and usual practice of working with effect; and they ceased to work the highest seam, and were working the lowest in advance of the intermediate; a suit to compel the simultaneous working of all the seams was dismissed.[1]

Several seams —application of covenant to parts of one.

Where seven seams of coal were specifically demised; and one of them comprised two parts, which could only be worked separately; and the lessees covenanted to work "the different seams of coal in such succession and by such ways . . . as not to injuriously affect or make it more difficult and expensive to work the seam or seams lying next beneath or next above;" it was held, that the two parts were not separate seams within the covenant.[2]

Support for surface— generally.

Where a lessee covenants to leave pillars to support the surface; and fails to do so; he is of course liable on the covenant,[3] as well as under the general law.[4] Where a lessee, contrary to his covenants, causes the fall of fences bounding the demised land by excavations under them, he may be compelled by mandatory injunction to restore them.[5]

Covenant to leave support —running with land.

The benefit of a covenant to leave support runs with the land.[6]

Compensation for damage by subsidence— running with land.

A covenant to make compensation for damage by subsidence is sometimes made with or for the benefit of persons who are not parties; and questions may arise whether it runs with the land; and by whom it is enforceable. By a lease of January, 1887, the owners of mines, but not of the surface, demised the coal under a large area to C. for thirty years. C covenanted with the lessors, "and as separate covenants with other the owners or owner, occupiers or occupier for the time being of the said lands . . . to pay to the said lessors and other the covenantees or the covenantee compensation for all or any damage" occasioned by the working of the coal demised. C. died in September, 1887; and in October, 1896, the lease was assigned to a company. The company worked

[1] Abinger *v.* Ashton, 17 Eq. 358. Cf. Wheatley *v.* Westminster Brymbo Co., 2 Dr. & Sm. 347, 9 Eq. 540, 553, 554. Cf. also Strelley *v.* Pearson, 15 Ch. D. 113.

[2] Brewer *v.* Rhymney Iron Co., 1910, 1 Ch. 766.

[3] Hodgson *v.* Moulson, 18 C. B., N. S. 332. It is, however, submitted that the covenant was not in fact one for the support of the surface.

[4] See *post*, p. 300.

[5] Newton *v.* Nock, 43 L. T., N. S. 197.

[6] Forster *v.* Elvet Colliery Co.; Quin *v.* The Same; Seed *v.* The Same; Morgan *v.* The Same, 1908, 1 K. B., *per* Farwell, L.J.

the coal till 1906, when a subsidence took place. The devisees and trustees of a surface owner, who was living at the date of the lease, and other surface owners, who had acquired their title since that date, brought actions against the company; and they joined as defendants the trustees and executors of C.'s will, against whom they claimed damages by virtue of the covenant. It was held (1) that the covenant was one "respecting any tenements or hereditaments" within section 5 of the Real Property Act, 1845; and that the benefit, so far as it necessarily affected the value of the land, ran with the land, although the owners of the surface were not parties to the lease: (2) that the covenant with the "owners for the time being" included owners in existence at the date of the lease; with whose "heirs and assigns" it must be deemed, as it related to land, to have been made, by virtue of the Conveyancing and Law of Property Act, 1881, s. 58, sub-s. 1: and (3) that it consequently enured for the benefit of the then owner's heirs and assigns, and therefore for the benefit of all the plaintiffs.[1]

Compensation for damage to crops—running with land.

A covenant to make compensation for damages to crops runs with the land;[2] and, if entered into by two or more persons, jointly and severally, will bind an assignee of any of them.[3]

Injury to future buildings.

A common covenant in a mining lease is a covenant that the lessee will not injure (not merely existing buildings, but) "buildings to be hereafter erected." Such a covenant may give rise to several questions; which may, it is submitted, be answered as follows:—Where a building is erected subsequently to the lease, but before the lessee works under or near the site; and the lessee subsequently works, and injures the building; he is liable. Where a building is erected subsequently to the lease, and also subsequently to the time when the lessee works under or near the site; and there has been no subsequent working by the lessee; the lessee is not liable. He cannot be under a duty to take artificial means to restore the stability of the site.[4] Where a building is erected subsequently to the lease, and also subsequently to the time when the lessee works

[1] Forster *v.* Elvet Colliery Co.; Quin *v.* The Same; Seed *v.* The Same; Morgan *v.* The Same, 1908, 1 K. B. 629.

[2] Norval *v.* Pascoe, 34 L. J. Ch. 82, 84.

[3] *Ib.*

[4] The principle of Greenwell *v.* Low Beechburn Coal Co., 1897, 2 Q. B. 165, and Hall *v.* Norfolk, 1900, 2 Ch. 493 (*post*, p. 445), would seem to apply.

under or near the site; and there has been a subsequent working in the same or any other seam; and the injury would not have happened but for such subsequent working; the lessee is liable. Sometimes in the latter class of case some injury is observable as soon as the building has been erected. The lessee is entitled to have the extent of this injury taken into consideration and deducted; but the burden is upon him to prove both the fact and the extent.

"Leaving" pillars for support of mine.

A covenant by a lessee, that he will, at the determination of the lease, "leave" sufficient pillars for the support of the roof and for preventing of thrusts and creeps, precludes him from in the meantime removing them.[1] Where, in 1843, a tenant for life granted a lease for ninety-nine years by way of mortgage; and the mortgagees were precluded thereunder [2] from removing certain pillars without the consent of the tenant for life, his heirs and assigns; and in April, 1850, the tenant for life created a further charge on the lease, and assigned his life estate by way of further security; and in May, 1850, the tenant for life granted a lease for forty years to a trustee for the mortgagees at a dead rent and royalties; and the lessee thereby covenanted not to remove the pillars without the consent of the mortgagor or his assigns; it was held, that, during the subsistence of the lease of May, 1850, the pillars could not be removed without the consent of the tenant for life or his assigns who became such subsequently to that lease; but that, if the tenant for life should survive the expiration of that lease, the mortgagees under the instrument of April, 1850, as assigns of his life estate, could, during the remainder of his life, consent to the removal of the pillars by the persons interested under the lease of 1843.[3]

Breach of such covenant —measure of damages— consequential injury.

And where such mortgagees and lessees granted a sub-lease; and authorised the sub-lessees to remove the pillars, which they did; and the mortgagor could himself have worked them at the expiration of the lease of May, 1850, if they had been left; it was held, that the royalty payable under the lease was not the measure of the lessees' liability. They were held liable for the full value of the minerals removed. And, although they

[1] Mostyn *v.* Lancaster, 23 Ch. D. 583, 600.

[2] By reference: see *ib.* 602, 623, 624.

[3] Mostyn *v.* Lancaster, 23 Ch. D. 583.

were allowed the expense of bringing to bank, they were disallowed the expense of getting and severing.[1] And they were also held liable for all injury from consequential flooding. And, although they were mortgagees as well as lessees, they were held disentitled to do in their former character that which they could not do in their latter. And they were charged accordingly in taking the accounts against them in foreclosure proceedings.[2]

Drowning—no covenant.

A lessee is not entitled, *primâ facie*, to artificially conduct water from an adjoining mine into the demised mine.[3] Nor will a lessee, independently of his liability (if any) under covenant, be allowed to work in such a way as to probably cause the mine to be drowned.[4] He cannot, however, in the absence of covenant, be compelled to take any active step to prevent the mine from being drowned; and the mere fact that he may have granted a right of way to the lessor through the demised mines to other mines is for this purpose immaterial.[5]

Drowning—effect of covenant.

Where a lessee entered into covenants not to do, or suffer to be done, any act or thing which might occasion or tend to produce the drowning of the mine; and to leave the lessor, at the end of the term, if he should so require, all the machinery, upon receiving twelve months' notice, and being paid for the same; and the lease empowered the lessee during the term, or within twelve months after its expiration, to remove all the machinery unless the lessor purchased; and, fourteen years before the expiration of the term trustees, under the lessee gave the lessor notice of their intention to remove the machinery, unless he purchased; it was admitted, that the trustees might possibly be liable in damages, if the mine were actually drowned;[6] but it was held, that the lessor could not oblige them to leave the machinery unemployed upon the demised premises until the end of the term;[7] and that, unless he purchased, they could not be restrained from removing it;

[1] See further, as to this, *post*, pp. 538—540.

[2] Taylor *v.* Mostyn, 33 Ch. D. 226.

[3] Jegon *v.* Vivian, 6 Ch. 758. See also *post*, pp. 507 *et seq.*

[4] See Lewis *v.* Fothergill, 5 Ch. 110; and cf. Jegon *v.* Vivian, 6 Ch. 756. See also Anon., Amb. 209; Hodgkinson *v.* Crowe, 19 Eq. 594.

[5] Payne *v.* Rocher Coll. Co., W. N. 1887, p. 37.

[6] See 4 K. & J. 648, 649.

[7] Cf. Beaufort *v.* Bates, 3 De G. F. & J. 381, 395.

although such removal would occasion or tend to produce the drowning.[1]

Removing barriers.

Independently of his liability (if any) under covenant, a lessee who removes a barrier between the demised mine and an adjoining mine is, *primâ facie*, guilty of waste.[2] Where a lessee covenants to leave proper and sufficient barriers in the demised mine against all adjoining mines, and to prevent the draining or laying dry any such adjoining mines, he will, if necessary, be compelled, by mandatory injunction, to perform his covenant.[3]

Adjustment of conflicting obligations— covenant to work "out."

In *Butterknowle, &c., Co.* v. *Bishop Auckland, &c.*,[4] Lord Macnaghten said, that, to exclude the presumption of the right of support, in the case of a lease, it was not enough that the lessee was bound "to work out" the minerals; and, in *Butterley Co.* v. *New Hucknall Co.*[5] he said, referring to the *Butterknowle* case, "I have no desire to retract or qualify anything that I am reported to have said in that case." Assuming, however, that the words "to work out" mean "completely to work out," this dictum is unsustainable. There is no authority for it. There is high authority against it.[6] And it can hardly be, that a lessee should be liable in damages if he breaks such a covenant; and should be also liable to an injunction and damages if he keeps it.[7]

Covenant to work "long wall."

The position is the same, if a lessee covenants to work "long wall"; or covenants to work according to the best and most improved methods in use, and long-wall working is shown to be within these words.[8]

Covenant not to injure or endanger buildings.

When leases of coal under 346 acres contained covenants by the lessees to work "in a fair, proper, and workmanlike manner, and according to the best mode of working for the time being adopted in the neighbourhood;" and empowered or obliged the lessees to let down the surface, provided that they did not

[1] Rolleston *v.* New, 4 K. & J. 640: cf. Goodrich *v.* Everglyn Coal Co., W. N. 1889, p. 152.

[2] Marker *v.* Kenrick, 13 C. B. 188.

[3] Mexborough *v.* Bower, 7 Beav. 127.

[4] 1906, A. C. at p. 313.

[5] 1910, A. C. at p. 385.

[6] See Shafto *v.* Johnson, 8 B. & S. 252; Taylor *v.* Shafto, *ib.* 228, 231; Eadon *v.* Jeffcock, L. R. 7 Exch. 397; Davis *v.* Treharne, 6 A. C. 466, *per* Lord Blackburn, 469, 470, *per* Lord Watson.

[7] See Butterley Co. *v.* New Hucknall Co., 1910, A. C. 389, 390, *per* Lord Atkinson.

[8] *Ib.* The Court of Appeal (not reported in that Court), in Davis *v.* Treharne, *sup.*, were apparently of a different opinion.

injure or endanger existing or future buildings ; [1] and the surface already built upon comprised 42 acres ; and the system of working usually adopted in the neighbourhood was the long-wall system, or a modification of it, under either of which all the coal was worked, and no pillars were left ; and the lessees worked under the 42 acres on the pillar and stall system, under which pillars were left for support ; and it was proved that no other system could have been used without injuring or endangering the buildings ; it was held (1) that, in arriving at the meaning of what was " fair, proper, and workmanlike " working, all the circumstances must be considered, including the lessees' obligation to support ; (2) that the " best mode of working " meant the best under all the circumstances, and that even the system in general use, if meant, was only to be used where applicable ; and (3) that the " pillar and stall " system was therefore properly used under the 42 acres.[2]

No specific performance of covenant to work.

Specific performance cannot be obtained of a covenant to work a mine.[3] If the law were otherwise, the Court would be subjected to incessant applications as to the working ; and would, in effect, have thrown upon it the duty of managing and superintending the working ; and this duty it invariably declines.[4] So, where there is a breach of a covenant to work a mine in a particular manner, the remedy for the breach is usually in damages only.[5] Nor can the object of the lessor be indirectly reached by an injunction to restrain the working altogether unless the particular mode in question is pursued.[6] To justify such an injunction the lessee must have entered into some negative covenant of a precise kind ; as, for instance, not to work at all except in the particular mode specified ; [7] or not so negligently or wilfully to work " as to hazard or endanger or occasion loss or damage to the mine." [8] This is a principle which is applicable to other cases besides those of mining

[1] See as to this, *post*, pp. 339, 340.

[2] Brewer *v.* Rhymney Iron Co., 1910, 1 Ch. 766.

[3] See Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 538, 551, 552 ; Abinger *v.* Ashton, 17 Eq. 358 ; Moore *v.* Ullcoats, &c., Co., 1908, 1 Ch. at p. 585. See also Booth *v.* Pollard, 4 Y. & C. Exch. Eq. 61 ; Pollard *v.* Clayton, 1 K. & J. 462.

[4] Pollard *v.* Clayton, *sup.* ; Wheatley *v.* Westminster Brymbo Coal Co., *sup.*

[5] Wheatley *v.* Westminster Brymbo Coal Co., *sup.* 554.

[6] Abinger *v.* Ashton, 17 Eq. 358, 371.

[7] *Ib.*

[8] See Moore *v.* Ullcoats, &c., Co., *sup.* at pp. 585, 586.

leases. But to mining property it is peculiarly applicable. The Court has the greatest reluctance to grant injunctions to restrain the working of mines; on account of the great injury and inconvenience which may be caused. And it invariably refuses to do so, unless there is a "breach of an express covenant, or uncontroverted mischief." [1] *A fortiori*, an injunction will not be granted, if the particular mode of working in question be shown to be not in accordance with the usual practice in the district.[2] And, of course, it will not be granted, if it be shown to involve probable danger to life.[3]

(ε) *Covenants to repair and deliver up.*

Repairs.

Questions have arisen as to the effect of a covenant to keep levels, drifts, and aircourses clear and in good repair.[4]

No specific performance as to repairs.

Specific performance cannot be had of a covenant to repair.[5] Nor in general can such a covenant be indirectly enforced by injunction.[6]

Delivery up of fixtures.

A covenant to erect a smelting mill in connection with a demised mine, and to keep it in repair, and to deliver it up at the end of the lease, runs with the reversion; because it tends to the benefit of the mine.[7] Where a lessee has entered into a covenant not to remove the machinery at the end of his lease, an injunction may of course be obtained to restrain him from infringing that covenant.[8]

Fixtures, stock, &c.— oppressive covenant.

A covenant giving a lessor an option to purchase machinery, stock, &c., may be so oppressive, that the Court ought not to grant an injunction to prevent a breach of it.[9]

Fixtures— construction.

Questions of construction have arisen as to the effect of covenants to keep in repair, and deliver up, and give a lessor an option to purchase, fixtures.[10]

[1] See Anon., Amb. 209, *per* Lord Hardwicke; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552; *ante*, p. 98, n. [5], and other cases there cited.

[2] Abinger *v.* Ashton, 17 Eq. 358, 377.

[3] *Ib.* 373—375.

[4] See James *v.* Cochrane, 8 Exch. 556.

[5] See Flint *v.* Brandon, 8 Ves. 159.

[6] Abinger *v.* Ashton, 17 Eq. 376.

[7] Easterby *v.* Sampson, 1 Cr. & J. 105; affirming Sampson *v.* Easterby, 9 B. & C. 505.

[8] See Hamilton *v.* Dunsford, 6 Ir. Ch. 412.

[9] Talbot *v.* Ford, 13 Sim. 173: cf. Rolleston *v.* New, 4 K. & J. 646, 647.

[10] Foley *v.* Addenbrooke, 13 M. & W. 174; Beaufort *v.* Bates, 3 De G. F. & J. 381, 397. It was in evidence in the latter case, that by the custom of the district (the county of Brecon) "ways and roads" in a mining lease did not include tramplates and sleepers: see

(η) *Covenants as to Inspection, Weighing, &c.*

Where a shaft leading to the mine is itself within the demised property, the lessor is, in the absence of stipulation, entitled to go down the shaft and inspect the mine.[1] Where no covenant.

The provisions of section 14 of the Conveyancing Act, 1881, restricting the right of forfeiture for breaches of covenants in leases, are not available in the case of a covenant or condition in a mining lease to allow the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.[2] Conveyancing Acts.

SECT. 4.—COVENANT BY LESSOR—HIS LIABILITY INDEPENDENTLY OF COVENANT.

Where a lessor covenanted, that the lessee should and might peaceably and quietly have, hold, occupy, possess, and enjoy the demised mine without any let, suit, trouble, molestation, interruption, or disturbance whatsoever; and the lessor, in working ironstone, which lay above the demised mine, caused part of the roof of the demised mine to crush and fall in, and also caused the demised mine to be flooded; but no act was done by the lessor upon the demised mine itself; it was held, that, in respect of both acts of damage, the covenant was infringed.[3] Quiet enjoyment—no act done upon mine.

Where the defendant leased to the Parkside Company a mine for the purpose of being worked as an iron mine; and he subsequently leased to the plaintiffs an adjoining mine for the same purpose, the lease to the plaintiffs containing a covenant for quiet enjoyment of the mine "without any interruption or eviction by the lessor, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him;" and the Parkside Company, while properly working their mine, "pecked" away some rock, and, in so doing, came upon a large body of underground water, the existence of which was previously unknown; and the water flooded their mine; and it thence rose into the plaintiffs' Quiet enjoyment—"interruption."

pp. 387, 390: cf. Lowther *v.* Cavendish, 1 Eden, 118.

[1] See Lewis *v.* Marsh, 8 Ha. 97, 99.

[2] See sub-s. 6 (ii). See also sub-s. 3 of s. 2 of the Conveyancing Act, 1892. For an injunction to restrain the removal of ore until it was measured, see Wright *v.* Pitt, 12 Eq. 408, 417.

[3] Shaw *v.* Stenton, 2 H. & N. 858: cf. Mundy *v.* Rutland, 23 Ch. D. 81.

mine, which was on a higher level, and caused it considerable damage; it was held, that the defendant was not liable upon the covenant. The "interruption" was not the "pecking," which the defendant had authorised, but the flow of water, which he had not.[1]

Quiet enjoyment implied from word "let."

A covenant for quiet enjoyment without interruption from the lessor, or any person claiming through the lessor, is implied by the word "let." [2]

Derogation from grant—surface and mines.

When lands called "Stuffynwood Hall" and the mines thereunder were vested in the defendant and others in trust for the defendant for life; and two contemporaneous leases were executed, namely, (1) a lease for a long term by the trustees and certain adjoining mine owners to persons called "the demising trustees" on trust to grant a specified mining lease, and (2) the mining lease; and the mining lease gave power to the lessees to let down the surface, but with a provision, that in case serious damage by subsidence was anticipated, the lessees might, without paying for the same, leave such coal for support as should be agreed upon by the demising trustees; and the defendant subsequently let Stuffynwood Hall, excepting the mines, but not reserving a right to let down, and not making the surface letting subject to the mining lease; and, serious damage to the surface being subsequently anticipated, the defendant influenced the demising trustees to refuse to agree to support being left; and the mines were worked; and subsidence resulted; the defendant was held liable for damages for derogation from her grant.[3]

Liability to indemnify for demising stranger's mine.

A lessor may be liable to indemnify the lessee, if property, which he purports to include in the demise, belongs to a third party, and the latter recovers against the lessee for working it.[4]

Sect. 5.—DISTRESS.

Generally.

Independently of any provision to that effect, a distress will lie on non-payment of a dead rent: or even on non-payment of a tonnage royalty, or a footage rent; the maxim, *Id certum*

[1] Harrison, Ainslie & Co. *v.* Muncaster, 1891, 2 Q. B. 680. See further, as to covenants for quiet enjoyment, *ante*, pp. 229, 230.

[2] Markham *v.* Paget, 1908, 1 Ch. 697.

[3] *Ib.*

[4] See Thomas *v.* Atherton, 10 Ch. D. 197, 199.

est, quod certum reddi potest, being in the latter cases applicable.[1] And, although section 6 of the Bills of Sale Act, 1878, provides, that certain instruments giving powers of distress to secure debts shall be deemed to be bills of sale, it expressly excepts "mining leases;" for reasons which are not obvious.[2]

As to lands out of which no rent issues.

It is common in a mining lease, especially where the shaft is on an adjoining property, to insert a power of distress applicable both to the demised property and to the adjoining property. Such a power does not run with the adjoining property. But it is binding as against assignees with notice.[3] And it is not a bill of sale within section 4 of the Bills of Sale Act, 1878.[4]

SECT. 6.—RE-ENTRY.

Generally.

Where, as usually happens, a lease provides, that, in the event of the lessee making default in payment of the rent, or in performance or observance of the other covenants or provisions, the lease shall be absolutely void, the proviso is considered to be inserted for the benefit of the lessor only, and not for the benefit of the lessee.[5] Subject to the provisions of section 14 of the Conveyancing Act, 1881, the lessor may, on the happening of the event in question, pronounce the lease to be void or not, at his option.[6] And the lessee will not, on the happening of the event, be allowed to insist, that, by reason of his previous payment of rent, he has become a tenant from year to year;[7] or be allowed, in an action against him for subsequent breaches of covenant, to insist, that the lease has been already avoided.[8] On the other hand, even independently of those provisions, the lessor must, on the happening of the event in question, do some act showing his

[1] Daniel *v.* Gracie, 6 Q. B. 145; R. *v.* Westbrook, 10 *ib.* 205; Edmonds *v.* Eastwood, 2 H. & N. 826; *Re* Roundwood Colliery Co., 1897, 1 Ch. 389.

[2] For possible reasons, see *In re* Willis, 21 Q. B. D. 388, *per* Cave, J.; *Re* Roundwood Colliery Co., *sup.* 391, *per* Lindley, L.J.

[3] Daniel *v.* Stepney, L. R. 9 Exch. 185; reversing S. C. 7 *ib.* 327; Roundwood Colliery Co., *sup.* 390.

[4] *Re* Roundwood Colliery Co., 1897, 1 Ch. 373. For the meaning in such connection of the words "any adjoining or neighbouring collieries," see *ib.*

[5] Doe *v.* Bancks, 4 B. & Al. 409; Roberts *v.* Davey, 4 B. & Ad. 664.

[6] Doe *v.* Bancks, *sup.* 401; Muskett *v.* Hill, 5 B. N. C. 694; James *v.* Young, 27 Ch. D. 656, 661, 662.

[7] Doe *v.* Bancks, *sup.* 401.

[8] *Ib.*

intention to avoid the lease; and cannot, without doing such act, treat the lessee as a mere trespasser.[1]

Action to recover possession.

An action to recover possession will lie for mines as well as surface property.[2]

Collusive working.

Where a lease contained a proviso avoiding it, if the demised mine "should stop or cease working at any time two years," it was intimated that, to preserve the lease, the working must be *bonâ fide*, and not collusive or fraudulent.[3]

Conv. Act, 1881.

Section 14 of the Conveyancing Act, 1881, provides that a right of forfeiture of a "mining lease" shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the breach complained of; and, if capable of remedy, requiring the lessee to remedy it; and, in any case, requiring the lessee to make compensation in money; and the lessee fails within a reasonable time to remedy the breach, if capable of remedy, and to make reasonable compensation. And the lessee may (either in the lessor's action or in his own) apply to the Court for relief; and the Court may grant or refuse it, as it thinks fit, and, in case of relief, may grant it on such terms as it thinks fit. But these provisions do not extend to a clause against the assigning, underletting, parting with the possession, or disposing of the land leased; or (after a year from the bankruptcy or execution [4]) to a clause for forfeiture on bankruptcy, or on the taking in execution of the lessee's interest; or to a clause for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof. And they do not apply in the case of non-payment of rent.[5] The notice required to be served is sufficiently served, if left for the lessee at the office or counting-house of the mine; or if sent there by post in a registered letter addressed to the lessee by name, and such letter is not returned through the post-office undelivered; and service is deemed to be made at the time when the registered letter would in ordinary course be delivered.[6]

Delay.

And, having regard to the fluctuating character of mining

[1] Roberts *v.* Davey, *sup.* See also Bowser *v.* Colby, 1 Ha. 130, 131.

[2] See *post*, p. 528.

[3] Doe *v.* Bancks, 4 B. & Al. 403.

[4] See sub-ss. 2 and 3 of s. 2 of the Conveyancing Act, 1892.

[5] See s. 14 of the Act of 1881.

[6] See s. 67. For the meanings of rent and mining lease under the Act, see *ante*, p. 181, n. [6].

property, the lessor must in all cases be prompt in enforcing his right of forfeiture.[1]

Actual re-entry impracticable.

Where the proviso for re-entry merely gives power to the lessor to re-enter, he must either actually re-enter, or do that which in law is equivalent to re-entry. One equivalent at all events is an action to recover possession.[2]

Relief within six months.

And the lessee may, at any time within six months after execution, obtain relief against forfeiture for a breach of covenant to pay rent; upon paying the rent and arrears and all costs of the lessor.[3] And he may equally obtain relief, whether the lease contains a mere power of re-entry on non-payment, or a proviso that in that case the lease shall be void.[4]

Irish leases.

Where, on an Irish tenancy from year to year, a notice to quit is given by the landlord with a view to the use of the land for turbary; or the opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any incidental works or buildings; or the obtaining of brick earth, gravel, or sand; and the notice to quit so states; it is no objection to the notice that it relates to part only of the holding. But the tenant is entitled to compensation, and to a proportionate reduction in his rent.[5]

Agricultural Holdings Act, 1908.

The Agricultural Holdings Act, 1908, contains provisions of a very similar kind.[6]

SECT. 7.—SURRENDER.

Performance of covenant—a condition precedent.

A lease contained numerous covenants by the lessees as to the mode of working. It then provided, that, if the lessees should give notice of their desire to give up possession before the end of the eighth year of the term, then, "all arrears of rent being paid, and all and singular the covenants" on the part of the lessees having been performed, the lease should be void; "but, nevertheless, without prejudice" to any remedy to which "any of the parties" might be entitled for breach of any of the covenants. It was (notwithstanding the sub-proviso) held, that the performance of all the covenants by the lessees was a condition precedent to their right to determine.[7]

[1] Bowser *v.* Colby, 1 Ha. 139.

[2] See Moore *v.* Ullcoats, &c., Co. 1908, 1 Ch. at pp. 587, 588.

[3] Bowser *v.* Colby, 1 Ha. 109.

[4] *Ib.*

[5] 39 & 40 Vict. c. 63, s. 3.

[6] See s. 23.

[7] Grey *v.* Friar, 4 H. L. Cas. 565, affirming Friar *v.* Grey, 5 Exch. 584; and overruling Grey *v.* Friar, 15 Q. B.

Application of proviso to preceding events.

Where a lease empowered the lessee to surrender upon the happening of an "inevitable accident;" but the power did not in terms apply to accidents which had already occurred; it was held, that it did not free the lessee from the liability to pay rent; although the lease was expressed to commence from a time antecedent to the happening of the accident in question; and the reference in the power was to accidents "during the continuance of the said term." [1]

"Fairly wrought."

Where a lease contained a stipulation, that the rent should cease, in case the whole of the coal, so far as the same could be "fairly wrought," should be worked out before the expiration of the term, it was held, that "fairly wrought" did not refer to profit, but meant that which can be fairly and properly gotten according to mining usage without extraordinary difficulty or expense.[2]

Effect of other obligations.

Where a lessee has power to surrender upon the "exhaustion" of the demised mines, he may, it is submitted, surrender as soon as he has worked all that it is possible to work without infringing his other obligations, *e.g.*, those arising from his duty to leave support under the general law,[3] or those arising under a covenant to leave specified pillars for support, or specified barriers against water.

"At any time."

A power to surrender "at any time" upon giving a specified notice means what it says; and the lessee is not obliged to give a notice expiring at a date which corresponds with the commencement of the tenancy.[4] The same principle does not apply to mining tenancies as to ordinary tenancies; both because mining works are essentially experimental and hazardous, and because it matters not at what season of the year they are carried on. If such a lessee determines at a time other than that fixed for the payment of rent, the lessor is entitled to an apportioned part up to the determination.[5]

Waiver of right.

Where lessees gave notice of their intention to surrender;

901, which reversed Friar *v.* Grey, *ib.* 891.

[1] See Jervis *v.* Tomkinson, 1 H. & N. 195. An influx of brine is probably in a lease of salt mines an "inevitable accident:" see *ib.*

[2] Griffiths *v.* Rigby, 1 H. & N. 237. See further, as to this case, *ante*, p. 252.

[3] See *post*, p. 300.

[4] Bridges *v.* Potts, 17 C. B., N. S. 314.

[5] 33 & 34 Vict. c. 35. This appeared formerly to be doubtful: see Bridges *v.* Potts, 17 C. B., N. S. 314.

and, after the time fixed by the notice had expired, continued for two months to work out portions of the demised coal, contending that it was usual for a tenant to take away such portions on abandoning a colliery; it was held, that they had not waived the notice.[1]

SECT. 8.—ARBITRATION.

Arbitration. Where a lease contains a stipulation, that disputes between the lessor and the lessee shall be referred to arbitration, pursuant to the provisions of the Arbitration Act, 1889; and disputes arise; the Court may, on the application of either party, direct a reference;[2] under which payment of damages may be ordered.[3] And it is no objection to directing a reference, that arbitrators cannot grant an injunction;[4] or that there can be no appeal from their decision.[5]

SECT. 9.—STAMPS.

Stamps. Where the consideration, or any part of the consideration for which a lease is granted, or agreed to be granted, consists of any produce,[6] the value of such produce is deemed a consideration in respect of which the lease or agreement is chargeable with *ad valorem* duty. And where it is stipulated, that the value of such produce is to amount at least to, or is not to exceed, a given sum; or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion; the value of such produce is, for the purpose of assessing the duty, estimated at such given sum, or according to such permanent rate.[7] A lease containing several demises for distinct terms, and at distinct rents, if stamped according to the aggregate of the stamps required for the several demises,

[1] Jones *v.* Shears, 4 A. & E. 832. For a case where the tenant from year to year of a stone quarry alleged a custom entitling him to a reasonable time after the end of his tenancy to remove stone which he had "bared," but without success, see Vint *v.* Constable, 25 L. T., N. S. 324.

[2] See Willesford *v.* Watson, 14 Eq. 572; 8 Ch. 473: see also Mexborough *v.* Bower, 7 Beav. 127; Horton *v.* Sayer, 4 H. & N. 643; Wheatley *v.* Westminster Brymbo Coal Co., 2 Dr. & Sm. 347.

[3] Willesford *v.* Watson, *sup.*

[4] *Ib.*

[5] *Ib.*

[6] This includes all cases of reservations in kind.

[7] Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 76.

is properly stamped.[1] A lease at a dead rent and a royalty is liable to *ad valorem* duty, and a £1 stamp.[2]

Sect. 10.—COSTS OF LEASE.

Costs of lease.

With respect to mining leases or licences or agreements therefor, the remuneration of a solicitor is regulated according to the then present system as altered by sch. 2 to the general order under the Sol. Remun. Act, 1881.[3] *Primâ facie* the lessee is liable for expenses properly incurred in preparing the lease. These include the fees of a conveyancer, whose aid is reasonably required. But they do not include the fees of a mining expert, or other expenses incurred antecedent to the instructions for the lease. Nor do they include the costs of the counterpart. And a third party order to tax, obtained by the lessee, does not alter the nature or enlarge the scope of the liability on the existence of which the order is based.[4]

[1] Boase *v.* Jackson, 3 Bro. & B. 185, a decision under the Act 55 Geo. 3, c. 184.

[2] Alpe, 18 and 154: and see Finance Act, 1910, s. 75.

[3] See s. 2 (c) of the order.

[4] *Re* Gray, 1901, 1 Ch. 239.

CHAPTER XII.

LICENCES.

a. Generally.

A LICENCE to dig minerals confers no estate or interest in the soil or mine containing them. Nor does it confer any estate or interest in the minerals before they are actually gotten. It merely authorises the doing of an act, which is, *primâ facie*, unlawful.[1] However, a licence to dig minerals, coupled with a grant to carry them away, is a profit *à prendre*, an incorporeal hereditament lying in grant.[2] And, if exercised by an actual taking of possession, it may be the subject-matter of use and occupation ;[3] and (if exclusive[4]) may be, and (even if non-exclusive[5]) probably may be, the subject-matter of an action to recover possession. But a licence, without an actual taking of possession, cannot be the subject-matter of an action to recover possession.[6]

Interest conferred by licence—generally.

A licence to dig minerals, coupled with a grant to carry them away, may be limited in favour of a man and his heirs ; or of a man, his executors and administrators.[7] In the former case, it creates an estate in fee simple.[8] In the latter, it gives, on the death of the grantee, an estate to his executors or

If coupled with grant, may be limited in fee or to personal representatives.

[1] See Norway *v.* Rowe, 19 Ves. 158 ; Doe *v.* Wood, 2 B. & Al. 738, 739, 741 ; R. *v.* St. Austell, 5 *ib.* 700, 701 ; R. *v.* Tremayne, 4 B. & Ad. 170 ; Roberts *v.* Davey, *ib.* 672; Muskett *v.* Hill, 5 Bing. N. C. 707, 7 Scott, 855 ; R. *v.* Fayle, 27 L. T. 65 ; St. Aubyn *v.* St. Aubyn, 1 D. & Sm. 619 ; L. & N. W. R. Co. *v.* Ackroyd, 31 L. J. Ch. 591 ; Norval *v.* Pascoe, 34 *ib.* 85.

[2] See Crocker *v.* Fothergill, 2 B. & Al. 652, 661 ; Wood *v.* Leadbitter, 13 M. & W. 843 *et seq.* ; Watson *v.* Spratley, 10 Exch. 235 ; Martyn *v.* Williams, 1 H. & N. 817, 824, 827 ; Morgan *v.* Crawshay, L. R. 5 H. L. 319 ; Sutherland *v.* Heathcote, 1892, 1 Ch. 483, 484.

[3] Jones *v.* Reynolds, 4 A. & E. 805, 809.

[4] See *post*, pp. 273, 274.

[5] See *post*, pp. 272, 273.

[6] Crocker *v.* Fothergill, *sup.* As to what amounts to a taking of possession, see *post*, p. 273.

[7] See Haigh *v.* Jaggar, 16 M. & W. 525, 3 Exch. 54 ; Martyn *v.* Williams, 1 H. & N. 827, 829 ; Carr *v.* Benson, 3 Ch. 525, 526.

[8] Martyn *v.* Williams, 1 H. & N. 827, 829.

administrators, if the duration of the grant has been fixed, and has not then determined.[1] Indeed, it has been said, that, even if the duration has not been fixed, an estate may pass to the executors or administrators, to last as long as any minerals remain ungotten ;[2] at all events, if the grant can operate under the Statute of Uses, and the grantee has elected that it shall so operate.[3] But the proposition, even in the latter form, is doubtful.[4] And if it be well founded, the election must be made while there is the power of electing. The executor of the grantee cannot elect.[5] And whether, if the grantee had discontinued working, the executor could, after a considerable lapse of time, again enter as if he were the licensee, is also doubtful.[6]

May be granted to persons not named.

A licence is frequently granted, not merely to a person or persons named simply ; but to a person named in conjunction with others not named, but described as his partners or co-adventurers. In such a case the persons not named will, equally with the person named, be entitled to exercise the licence.[7]

"Occupier" under Rail. Cl. or Wat. Cl. Act.

A licensee of minerals, with a grant to carry them away, is an "occupier" within the words "owner, lessee, or occupier," entitled to give the notice mentioned in section 78 of the Rail. Cl. Act, 1845, and in section 22 of the Wat. Cl. Act.[8]

Rateability.

A licensee, as such, not having any interest in the soil, is not rateable.[9] But a licensee in exclusive occupation of the land containing the mine ; or of buildings, machinery, and roads used in connection therewith ; is rateable in respect of such land ;[10] or of such buildings, machinery and roads.[11]

[1] See Haigh *v.* Jaggar, 16 M. & W. 525, 540 ; Low Moor Co. *v.* Stanley Coal Co., 34 L. T., N. S. 186.

[2] See Port *v.* Turton, 2 Wils. 170, 172 ; Atkinson *v.* King, Ir. R. 11 C. L. 540, *per* May, C.J.

[3] See Haigh *v.* Jaggar, 16 M. & W. 525, 540, 3 Exch. 68, 69.

[4] See and consider Low Moor Co. *v.* Stanley Coal Co., *sup.* See also Atkinson *v.* King, 2 L. R. (Ir.) 346, 350, *per* Christian, L.J.

[5] Haigh *v.* Jaggar, 3 Exch. 54, 68, 69.

[6] *Ib.* 54, 69, 70.

[7] See Norway *v.* Rowe, 19 Ves. 158, 159 ; Doe *v.* Wood, 2 B. & Al. 724.

[8] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552, 561. As to these sections, see *post*, pp. 371, 374, 375.

[9] See Morgan *v.* Crawshay, L. R. 5 H. L. 316 ; Kittow *v.* Liskeard, L. R. 10 Q. B. 13 : cf. R. *v.* St. Austell, 5 B. & L. 693.

[10] R. *v.* Fayle, 27 L. T. 65 ; Roads *v.* Trumpington, L. R. 6 Q. B. 56.

[11] Kittow *v.* Liskeard, 10 *ib.* 13.

b. Bare Licences and Licences clothed with Interests.

A bare licence may be created by parol.[1] It confers no interest in the minerals authorised to be dug even after they have been dug ;[2] although it enables the licensee to maintain an action for their recovery as against a mere wrongdoer, who removes them.[3] It is revocable ;[4] at all events, before it has been actually exercised, and expense has been incurred.[5] And a conveyance by the grantor is sufficient to revoke it.[6] Bare licence.

A licence to dig minerals, coupled with a grant to carry them away, and convert them to the grantee's own use, must, to be legally effectual, be created by deed.[7] But, if created by a mere written contract, followed by exercise and also followed by the expenditure of money, it has apparently been always effectual in equity.[8] Indeed, it has been held effectual, although created by a mere verbal arrangement with an agent, and although the agent exceeded his authority ; the principals having stood by and allowed the mining operations to proceed, and having only interposed when they proved successful.[9] And if created by a mere written contract for a valuable consideration, an action has always lain for a breach of that contract.[10] Such a licence gives to the grantee the right of property in such minerals as he gets, when by the act of getting he has converted them into chattels.[11] It may be assigned or demised *inter vivos ;* [12] but, only, so as to pass the Licence clothed with interest.

[1] See and consider Wood *v.* Leadbitter, 13 M. & W. 844, 845.

[2] See Haven, &c., Co., 20 Ch. D. 160.

[3] See Northam *v.* Bowden, 11 Exch. 70 ; where the plaintiff had a licence to dig and remove tin, and for that purpose, but without having any interest therein, to dig up the soil with which it was intermixed.

[4] See Webb *v.* Paternoster, 2 Roll. Rep. 143, 152, *per* Dodderidge, J. ; Wood *v.* Leadbitter, *sup.* 844.

[5] Wallis *v.* Harrison, 4 M. & W. 538.

[6] *Ib.*

[7] Wood *v.* Leadbitter, *sup.* 845, 854 ; Doe *v.* Powell, 8 Scott, N. R. 693, 701, 703 ; Watson *v.* Spratley, 10 Exch. 235 ; Atkinson *v.* King, 2 L. R. Ir.) 340. Wood *v.* Lake (Sayer, 3), a decision apparently to the contrary, cannot be supported : see Wood *v.* Leadbitter, *sup.* 850. Cf. Smart *v.* Jones, 15 C. B., N. S. 717.

[8] See Atkinson *v.* King, Ir. Rep. 11 C. L. 536, 540, *per* May, C.J. ; 2 L. R. (Ir.) 320, 335, *per* Ball, C., Morris, C.J., and Deasy, L.J. ; Christian, L.J., dissenting. Cf. White *v.* Jame son, 18 Eq. 303.

[9] See Harrison *v.* Ames, 15 L. T. 321.

[10] See Smart *v.* Jones, 15 C. B., N. S 717.

[11] Doe *v.* Wood, 2 B. & Al. 738, 739, 741 ; Carr *v.* Benson, 3 Ch. 534.

[12] Mountjoy's Case, Godb. 18 ; Muskett *v.* Hill, 5 Bing. N. C. 694 Martyn *v.* Williams, 1 H. & N. 827.

legal interest, by deed.[1] It is capable of transmission by will,[2] or of devolution on intestacy.[3] And it is irrevocable.[4]

c. Exclusive and Non-exclusive Licences.

Licence *primâ facie* non-exclusive.

The licensee of a right to dig minerals in a particular piece of land, although empowered to carry them away, and convert them to his own use, has not, *primâ facie*, the exclusive right to dig therein.[5] The licensor may, *primâ facie*, himself dig in the same land; or grant as many other similar licences, exercisable with respect to the same land, as he thinks fit.[6] And it is difficult to impute to a licensor knowledge of the extent of the licensee's intended operations, or otherwise of his objects in applying for the licence; so as to disable the licensor from himself subsequently working, or empowering others to do so.[7] It follows, that one licensee cannot, *primâ facie*, recover possession against another in respect of mines lying within the assigned limits, but not connected with the workings of the former.[8]

Rights of non-exclusive licensee.

A licensor cannot, however, sweep away from a non-exclusive licensee the whole of the benefit of the licence. The rights of the parties must be reasonably construed;[9] and the licensor must not disturb the licensee in his operations "when and where he is carrying them on."[10] Nor can a licensor do any act, which will defeat the known objects of a non-exclusive licensee in applying for his licence.[11] And, if a non-exclusive licensee has taken possession of a particular mine, and has

[1] See Harker *v.* Birkbeck, 3 Burr. 1563; Watson *v.* Spratley, 10 Exch. 235.

[2] Mountjoy's Case, *sup.*

[3] Martyn *v.* Williams, *sup.*

[4] Doe *v.* Wood, *sup.* 738; Wood *v.* Leadbitter, 13 M. & W. 845, 847; Muskett *v.* Hill, *sup.* 707; Sutherland *v.* Heathcote, 1892, 1 Ch. 484.

[5] Mountjoy's Case, Godb. 17; 1 And. 307; 4 Leon. 147; Moor, 174; Chetham *v.* Williamson, 4 East, 469; Doe *v.* Wood, *sup.* 739; Carr *v.* Benson, *sup.* 532, 534, 536; Haven, &c., Co., 20 Ch. D. 160; Sutherland *v.* Heathcote, 1892, 1 Ch. 485, 486. See also Lee *v.* Stevenson, E. B. & E. 512; Newby *v.* Harrison, 1 J. & H. 396. In Sutherland *v.* Heathcote, 1891, 3 Ch. 517, 518, 520, Vaughan Williams, J., expressed disapproval of statements such as that in the text, but they are justified by the judgment of the Court of Appeal in the same case: see 1892, 1 Ch. 478, 485.

[6] *Ib.*

[7] Carr *v.* Benson, *sup.* 534: cf. Jones *v.* Reynolds, 4 A. & E. 805, 808.

[8] Doe *v.* Wood, *sup.* 724, 737, 739.

[9] Carr *v.* Benson, *sup.* 534, 535. See also Lee *v.* Stevenson, *sup.*; Newby *v.* Harrison, *sup.* 397.

[10] Sutherland *v.* Heathcote, 1892, 1 Ch. 486, *per* Lindley, L.J.

[11] Carr *v.* Benson, 3 Ch. 525, 532.

actually opened and worked it, he is probably entitled to recover possession against any person who ousts him;[1] at all events, if he is entitled to the exclusive occupation of the soil containing the mine.[2] Indeed he is probably entitled to recover possession, even if he has only taken actual possession of a particular mine.[3]

Taking of possession.

However, merely digging holes in the soil is not a taking of possession. For the grantee may dig merely to examine the property; and see what kind of bargain he is about to make, or has made.[4] And, in order to take possession of a seam, something more must be done than clearing out an old pit which has not yet reached the seam;[5] however great the expense of so doing may be, and however obvious the reference of the expenditure may be to working the seam.[6] And it seems impossible, by merely striking into a particular seam, to acquire possession of it; at all events, if it is extensive, and runs through a considerable district, or through several collieries.[7]

Position of trespasser.

As against a mere trespasser, a non-exclusive licensee's rights are probably larger than as against another licensee.[8]

Exclusive licence.

Under the circumstances above stated, the desirability of obtaining an exclusive licence, if such be the intention, is obvious. And it should be obtained in express words. An exclusive licence will not be inferred from language which is not clear and explicit.[9] In *Sutherland* v. *Heathcote*[10] two persons, who, under a settlement, were respectively tenant for life in possession and tenant for life in remainder, but with a joint power to revoke existing and appoint new uses, conveyed and appointed certain of the settled lands, "saving and reserving" to the appointors, "their heirs and assigns, full and free liberty by all necessary ways and means to search for, get, dig, drain and carry away the coal, ironstone, and

[1] Doe *v.* Wood, 2 B. & Al. 737: see Roads *v.* Trumpington, L. R. 6 Q. B. 64.

[2] Roads *v.* Trumpington, *sup.*

[3] Carr *v.* Benson, 3 Ch. 534.

[4] Jones *v.* Reynolds, 7 C. & P. 335.

[5] Carr *v.* Benson, *sup.*

[6] *Ib.* 535.

[7] *Ib.* 534. As to the effect of acts of ownership, see *ante*, pp. 77 *et seq.*

[8] Doe *v.* Wood, *sup.* 742; Newby *v.* Harrison, 1 S. & H. 395; Carr *v.* Benson, *sup.* 531, 533. Cf. Northam *v.* Bowden, 11 Exch. 70, cited *ante*, p. 271. Cf. also Low Moor Co. *v.* Stanley Coal Co., 34 L. T., N. S. 186.

[9] Sutherland *v.* Heathcote, 1892, 1 Ch. 485.

[10] *Ib.* 475.

minerals, which may or shall be found within the several lands hereby granted." It was, notwithstanding the word "the," held that the saving operated as a re-grant of a non-exclusive licence only.[1]

Rights of exclusive licensee.

An exclusive licensee has not, any more than a non-exclusive, any interest in the soil; or, before the actual digging, in the minerals authorised to be dug.[2] An exclusive licensee may recover possession against any person who ousts him;[3] and may maintain trespass against any person who encroaches on his workings.[4]

d. Licence or other Instrument—Construction.

Grants held to create licences—Cheetham *v.* Williamson.

In *Chetham* v. *Williamson*[5] a covenant with, and grant to, a person, that it should be lawful for him, his heirs and assigns, at all times to enter upon certain lands to search and dig for coal, and to take and carry away the same to his and their own use, was held to create a licence only. And the mere fact that, by the same instrument, the licensor had derived his interest from the licensee, was held immaterial so far as respected the construction of the instrument.[6]

Doe *v.* Wood.

So in *Doe* v. *Wood*.[7] There a grant was made to A., his partners, fellow-adventurers, executors, administrators, and assigns, of free liberty to dig for tin and all other metals throughout certain lands, and to raise and dispose of the same to their own use, and to make adits, &c., necessary for the exercise of that liberty; excepting to the grantor liberty to drive any new adit within the lands "granted," and to convey any watercourse over the premises "granted;" *habendum* for twenty-one years. The grantee covenanted to pay rent, rates, and taxes; and to work the mines during the term. And the grant reserved a right of re-entry to the grantor on breach of covenant by the grantee. It was held, that,

[1] Affirming S. C., 1891, 3 Ch. 504. See also Stanley *v.* Riky, 31 L. R. (Ir.) 196.

[2] See Doe *v.* Wood, 2 B. & Al. 739: see *ante*, p. 269.

[3] Even a non-exclusive licensee may frequently do so: see *ante*, pp. 272, 273.

[4] Harker *v.* Birkbeck, 3 Burr. 1556; Wilson *v.* Mackreth, *ib.* 1824; Port *v.* Turton, 2 Wils. 172; R. *v.* Fayle, 27 L. T. 65; Low Moor Co. *v.* Stanley Coal Co., 33 L. T., N. S. 436, 444; affirmed, 34 *ib.* 186.

[5] 4 East, 469.

[6] See also Mountjoy's Case, Godb. 17; 1 And. 307; Moor, 174.

[7] 2 B. & Al. 724.

independently of the right of re-entry, the grant was not a lease, but only a licence ; [1] and that the mere reservation of a right of re-entry could not convert what would otherwise be a licence into a lease.[2]

In *Atkinson* v. *King*,[3] a grant in these words, "I agree to allow you to sink pit for coal in B. at 1*s.* 6*d.* per ton, and not to allow any one to sink on any coal you may prove in the pit," was said to be a licence.[4] Atkinson *v.* King.

In Sutherland v. *Heathcote*,[5] the facts of which have been already stated,[6] it was held, that the saving clause there in question did not operate as an exception of the minerals, but only as a re-grant of a licence to work them. The saving clause was not in favour of a prior owner in fee simple, but merely in favour of the donees of a power of appointment.[7] Sutherland *v.* Heathcote.

In *Stanley* v. *Riky* [8] there was an agreement to let bog ore for three years, with the following proviso referring to the lessees :— "If after the said period of three years we or either of us shall desire to continue to raise, get, and take away the said ore, we, or either of us so desiring, shall be entitled to do so, on payment" of the royalty therein mentioned. It was held, that this proviso was a licence. Stanley *v.* Riky.

In *Ex parte Hankey*,[9] A. entered into an agreement with B., authorising him during the then present year to dig earth and make bricks on two pieces of land, on payment of specified sums varying according to the quantity of the bricks to be made. It was held, that B.'s estate was a lease for a year. Grants held to create leases or tenancies— *Ex parte* Hankey.

In *Daniel* v. *Gracie*,[10] the proprietor of a house and of a marl pit and brick mine demised the house by an unwritten agreement to the plaintiff from a day named ; and it was at the same time agreed without writing, that the plaintiff should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, 8*d.* per solid yard for all the marl that he got, and 1*s.* 8*d.* per thousand for all the bricks Daniel *v.* Gracie.

[1] See also Norway *v.* Rowe, 19 Ves. 158 ; Muskett *v.* Hill, 5 Bing. N. C. 706, 707 ; and cf. Kittow *v.* Liskeard, L. R. 10 Q. B. 7, 13.

[2] A proviso for re-entry is frequently inserted in a licence : *post*, p. 277.

[3] Ir. Rep. 11 C. L. 540, *per* May, C.J.

[4] The dictum was dissented from by Christian, L.J., in the Court of Appeal, 2 L. R. (Ir.) 346, 350.

[5] 1891, 3 Ch. 504 ; 1892, 1 Ch. 475.

[6] *Ante*, pp. 273, 274.

[7] Cf. on this point, Hamilton *v.* Dunlop, 10 A. C. 813 ; *post*, p. 276.

[8] 31 L. R. (Ir.) 196.

[9] Mont. & M. 247.

[10] 6 Q. B. 145.

that he made. It was held, that the agreement for the marl pit and the brick mine was a demise from year to year.[1]

Re Stroud.

In *Re Stroud*,[2] A. agreed to let and B. to hire land and premises at a fixed surface rent for the purpose of brick-making. B. was to pay 3*s*. per thousand for the bricks, and to make at least 4,000,000 a year, or pay rent equal thereto; and he was not to excavate beyond the depth of eight feet without special licence. It was held, that B.'s estate was either a tenancy at will or from year to year.

Low Moor Co. *v.* Stanley Iron Co.

In *Low Moor Co.* v. *Stanley Iron Co.*,[3] a bargain and sale of unopened mines to a person, his executors, administrators, and assigns; not followed by enrolment or by livery of seisin, but followed by possession; was held at law to create neither a lease nor a licence, but only a tenancy at will.

Grant held to create lease for term and licence afterwards—Haigh *v.* Jaggar.

In *Haigh* v. *Jaggar* [4] there was a bargain and sale of the coal under certain closes to three persons, their executors, administrators, and assigns; with provisions, that from and after the commencing of the digging and sinking any pit or shaft for the sale of the coal, the grantees should have liberty of getting, selling, winning and working for any term of years computed from the time when they should begin to sink, until six acres of coal should be gotten; that at the expiration of twelve years the coal should be measured, and if six acres should not be then gotten there should be liberty to get the ungotten portion of the six acres; and when six acres were gotten there should be liberty to get the remainder; *habendum* for twelve years from the 2nd Feb., 1805. It was intimated, that the instrument operated as a demise for twelve years from the 2nd Feb., 1805, and as a licence after that time.

Exception held to create fee—Hamilton *v.* Dunlop.

In *Hamilton* v. *Dunlop*,[5] the owner of the whole property conveyed lands, reserving the "liberty of working the coal" in those lands. It was held, that he had reserved the whole estate in the coal, which he had at the date of the conveyance; and not a mere licence to work it.[6]

[1] Cf. Stoughton *v.* Leigh, 1 Taunt. 402, 409.

[2] 8 C. B. 502.

[3] 34 L. T., N. S. 186; in disregard of Haigh *v.* Jaggar, *infra*. In the Court below (33 *ib.* 436) Haigh *v.* Jaggar was followed.

[4] 16 M. & W. 525, 3 Exch. 54. See, however, Low Moor Co. *v.* Stanley Iron Co., 34 L. T., N. S. 186, *sup.*

[5] 10 A. C. 813.

[6] See also Sutherland *v.* Heathcote, 1892, 1 Ch. 483; and cf. that case, *ante*, pp. 273—274. Hamilton *v.* Dunlop

e. Rent—Covenants—Distress—Re-entry.

Rent.

Payments agreed to be made in respect of a licence are in the nature of rent.[1] As in the case of a lessor,[2] a licensor was always entitled, even before the Jud. Acts, to a remedy in equity for an account; and that irrespectively of whether he was also entitled to an injunction.[3]

Covenants running with land.

A covenant by a licensee to make compensation for surface damage, or to repair the mine, runs with the land;[4] and, if entered into by two or more persons jointly and severally, will bind an assignee of any of them.[5]

Distress.

A power of distress is inapplicable to the subject-matter of a licence as such; and should be expressly provided for, if such be the intention.[6]

Re-entry—generally.

A proviso for re-entry is also inapplicable to the subject-matter of a licence as such.[7] Its insertion in the grant is nevertheless frequently of use. For, under a licence, works may be erected, and corporeal possession had, which it may be competent to the grantor to resume.[8] Where the grant of a licence contains a proviso avoiding it on breach of covenant, the proviso is, as in the case of a lease,[9] considered to be inserted for the benefit of the grantor only, and not for the benefit of the licensee.[10] Subject to the provisions of section 14 of the Conveyancing Act, 1881, the grantor may, on the breach, pronounce the grant to be void or not, at his option.[11]

Obligations of grantor.

However, even independently of those provisions, the grantor must, on the breach, do some act showing his intention to avoid the grant; and cannot, without doing such act, treat the licensee as a mere trespasser. He may not, it is true, be able to actually enter, as in the case of a lease; or to do more than give notice of the avoidance. But such notice he should

appears to have been decided upon general principles, and not upon those of Scotch law only.

[1] *Ex parte* Hankey, 1 Mont. & M. 247.

[2] *Ante*, p. 244.

[3] See Wright *v.* Pitt, 12 Eq. 408.

[4] Martyn *v.* Williams, 1 H. & N. 817; Norval *v.* Pascoe, 34 L. J. Ch. 82.

[5] Norval *v.* Pascoe, *sup.*

[6] See Ward *v.* Day, 4 B. & S. 358; *Re* Roundwood Colliery Co., 1897, 1 Ch. 391, 399.

[7] Roberts *v.* Davey, 4 B. & Ad. 664, 672.

[8] Doe *v.* Wood, 2 B. & Al. 740.

[9] *Ante*, p. 263.

[10] Roberts *v.* Davey, *sup.* 664, 671, 672.

[11] Muskett *v.* Hill, 5 Bing. N. C. 694; S. C. 7 Scott, 855.

give.[1] And, independently of those provisions, whatever may be the terms of a proviso for re-entry, they should be strictly pursued. Where the proviso was, that the grantor might, on breach of covenant, avoid the grant by giving the licensee notice of the avoidance; and the notice actually given was, that, unless the covenant was thenceforth observed, the grant would be avoided; it was held, that this was an insufficient notice.[2] And the provisions of section 14 of the Conveyancing Act, 1881, restricting the right of forfeiture,[3] apply to mining licences; a "mining lease" under the Act including a licence.[4]

Intention implied from acts.

And the acts of the grantor may show an intention on his part to waive a forfeiture. And where a grantor attempted (although illegally) to levy a distress, and afterwards entered into negotiations to grant a new licence on the expiration of the existing one, it was held, that such an intention was sufficiently shown.[5] However, the exercise of a right of re-entry may sometimes be inferred from the acts of the grantor, where those acts would otherwise have been wrongful.[6]

Wrongful re-entry.

For a wrongful re-entry the licensee may bring an action.[7]

f. Stamps.

Stamps.

A licence to get minerals of the Duchy of Cornwall for a period not exceeding one year is exempt from stamp duty.[8]

[1] Roberts *v.* Davey, 4 B. & Ad. 664, 671, 672; James *v.* Young, 27 Ch. D. 661, 662.

[2] Muskett *v.* Hill, 5 Bing. N. C. 694.

[3] See *ante*, p. 264.

[4] See *ante*, p. 181, n. [6].

[5] Ward *v.* Day, 4 B. & S. 337, 5 *ib.* 359.

[6] Doe *v.* Wood, 2 B. & Al. 724.

[7] *Ib.*; Muskett *v.* Hill, *sup.* In Scotland a licensee, who had been made liable for flooding an adjoining mine, was held disentitled to an indemnity from his licensor; but it was intimated, that, if he had been a lessee, his position might have been different: Brand *v.* Bell's Trustees, 11 M. 42.

[8] 7 & 8 Vict. c. 65, s. 43. An equitable assignment of a licence did not formerly require a stamp: see Harker *v.* Birkbeck, 3 Burr. 1563. As to costs, see *ante*, p. 268.

CHAPTER XIII.

BANKRUPTCY AND DEATH AND CONSEQUENT DEVOLUTION.

a. Bankruptcy—Devolution.

Dissolution of partnership.

The bankruptcy of any partner in the working of an ordinary mine or quarry, whether he is a partner in the land itself also, or a mere co-owner of the land, operates, it is conceived, as a dissolution of the partnership. And, if any subsequent working is carried on between the old partner and the trustee, it is, it is conceived, by virtue of a fresh partnership arrangement. There are, no doubt, authorities declaring that, in this respect, mining partnerships differ from other kinds of partnership.[1] But, unless these authorities are taken to apply to cost-book mines,[2] they cannot, it is conceived, be considered law.[3]

Trader—Irish Bankruptcy Act.

A person, who works mines or quarries, may be a trader in the sense that mining operations have always been regarded as a species of trade.[4] He may not, however, necessarily be a trader within the meaning of the Bankr. (Ir.) Am. Act, 1872;[5] and it may be important to consider under what circumstances he is or becomes a trader within the meaning of that Act.

Alum-makers—brick-

The Act itself[6] includes in its specification of traders

[1] Fereday *v.* Wightwick, 1 R. & My. 49; *Ex parte* Broadbent, 1 M. & A. 638. See *ante*, p. 157, n. [8].

[2] See p. 530 of the 3rd edition of this book.

[3] See Jefferys *v.* Smith 3 Russ. 167. Cf. Tatam *v.* Williams, 3 Ha. 355.

[4] See *ante*, p. 95, n. [5], and cases there cited.

[5] 35 & 36 Vict. c. 58.

[6] S. 4; 20 & 21 Vict. c. 60, s. 90.

makers—lime-burners.

alum-makers,[1] brickmakers,[2] and limeburners.[3] It also includes "persons who . . . seek their living by buying and selling "... goods or commodities, or by the workmanship or "conversion of goods or commodities." [4]

Phosphate mine.

The owner of a phosphate mine, who sells the phosphate, is not within the latter description.[5]

Stone quarry.

Nor is a person who digs stones from his own quarry, and sells them ; [6] although he may become so by purchasing stones from others, if the purchase is on an extensive scale, and he intends to carry on a trade.[7]

Coal mine.

Nor is a person who works a coal mine, and sells the coal ; whether he has acquired the mine for that very purpose, or not.[8] And the mere facts of his buying articles, and selling

[1] An alum-maker was formerly held to be a trader, or not, according as he manufactured independently as a trade, or merely manufactured as a mode of enjoying the profits of his land : see Newton *v.* Newton, 2 Wils. 170 ; Port *v.* Turton, *ib.* 172 ; Watkins *v.* Caddel, 1 B. C. C. 176 ; Wells *v.* Parker, 1 T. R. 38 ; Parker *v.* Wells, 1 B. P. C. 545 ; Sutton *v.* Weeley, 7 East, 447 ; *Ex parte* Burgess, 2 Gl. & J. 200.

[2] A brickmaker was formerly held to be a trader, if he purchased or rented land, and manufactured bricks thereout for public sale as an independent trade (*Ex parte* Harrison, 1 B. C. C. 173 ; Wells *v.* Parker, *sup.* 34 ; Parker *v.* Wells, *sup.* ; Sutton *v.* Weeley, *sup.* 448 ; *Ex parte* Burgess, *sup.* 199 ; Heane *v.* Rogers, 9 B. & C. 590) ; or if the produce of his land was merely the raw material of a manufacture, and was used as such (Wells *v.* Parker, *sup.*) ; or if he purchased the materials of his manufacture (*Ex parte* Gallimore, 2 Rose, 424). But he was not held to be a trader, if he merely manufactured as the most beneficial means of enjoying the profits of his land (*Ex parte* Harrison, *sup.* ; Wells *v.* Parker, *sup.* ; Parker *v.* Wells, *sup.* ; Sutton *v.* Weeley, *sup.* 442 ; *Ex parte* Gallimore, *sup.* ; *Ex parte* Burgess, *sup.* ; Heane *v.* Rogers, *sup.* ; Paul *v.* Dowling, 3 C. & P. 500) ; whether he had a freehold or a leasehold interest therein (*Ex parte* Gallimore, *sup.* ; *Ex parte* Burgess, *sup.* ; *Re* Cleland, 2 Ch. 469) ; and notwithstanding that various ingredients were used, and that by the manufacture the earth was changed into a totally different substance (Sutton *v.* Weeley, *sup.* 447). And manufacturing generally for sale did not, of itself, constitute him a trader, if he had acquired the land by gift or devise (Sutton *v.* Weeley, *sup.* 446, 447. See, however, Wells *v.* Parker, *sup.* 40).

[3] The same distinction was formerly held to prevail in the case of limeburners, as in the case of alum-makers (as to which see *sup.*, n. [1]) : see Sutton *v.* Weeley, *sup.* 447 ; *Ex parte* Ridge, 1 Rose, 316 ; *Ex parte* Burgess, *sup.* 200 ; Paul *v.* Dowling, *sup.*

[4] S. 4 ; 20 & 21 Vict. c. 60, s. 90.

[5] *Ex parte* Schomberg, 10 Ch. 172.

[6] *Ex parte* Gardner, 1 Rose, 377 ; see also *Ex parte* Burgess, *sup.* 200, and cf. Steward *v.* Blakeway, 6 Eq. 481.

[7] *Ex parte* Gardner, *sup.*

[8] Port *v.* Turton, 2 Wils. 169 ; Wells *v.* Parker, 1 T. R. 38 ; on appeal, Parker *v.* Wells, 1 B. P. C. 545 ; *Ex parte* Broadbent, 1 M. & A. 640 ; Anon., Fonbl. Bk. R. 251.

them to his own pitmen, will not constitute him a trader.[1] But if he procures a particular species of coal from elsewhere on an extensive scale, to sell with his own, and so render his own marketable; and sells them together; he becomes a trader.[2] For, in such a case, he both buys and sells.[3]

Salt mine.

A person who takes a lease of salt-works and brine-pits for the purpose of manufacturing salt out of the springs and rock salt on the demised premises, and who manufactures salt accordingly, and sells it, is not within the description; although these several acts are done in conjunction with another person, and for the common benefit.[4]

Slate quarry.

Nor is a person, who becomes the lessee of a quarry, and works it up into slates for sale, within the description.[5] And he is not brought within it by merely selling tools and gunpowder to his workmen.[6] And, of course, he is not brought within it by a single act of selling spare iron to a builder to be used in buildings on the premises.[7]

Iron mine—lead mine.

Nor is a person, who smelts iron or lead ore from his own mines into pig iron, and sells it, within the description; although various ingredients are used in the smelting, and by the smelting an essentially different substance is produced.[8] But where a person not merely raises iron ore from his own mine, but purchases other iron ore on a large scale, and manufactures and sells both, he becomes a trader.[9] And, if the ore bought is to the ore raised in such a proportion as that of 65 or 70 to 35 or 30 per cent., the buyer becomes a trader; notwithstanding that the ore bought may have been bought for the purpose of making the ore raised a marketable commodity.[10] Where the lessee of an iron mine purchased large quantities of pig iron, which he manufactured into cast iron implements for the purpose of working the mine; and sold to persons in the

[1] *Ex parte* Gallimore, 2 Rose, 424.

[2] Port *v.* Turton, *sup.* 170; *Ex parte* Gallimore, *sup.*

[3] See and consider Anon., Fonbl. Bk. R. 251. Cf. Sutton *v.* Weeley, 7 East, 448.

[4] *Ex parte* Atkinson, 1 M. D. & De G. 300. This principle was doubted in Crawshay *v.* Maule, 1 Swanst. 518, 523.

[5] *Re* Cleland, 2 Ch. 466: cf. Kent *v.* Astley, L. R. 5 Q. B. 19, 25.

[6] *Re* Cleland, *sup.*: cf. *Ex parte* Gallimore, *sup.*

[7] *Re* Cleland, *sup.*

[8] See Watkins *v.* Caddel, 1 B. C. C. 176; Sutton *v.* Weeley, *sup.* 447.

[9] See Watkins *v.* Caddel, *sup.* 178; Crawshay *v.* Maule, 1 Swanst. 523, 528. Cf. Wells *v.* Parker, *sup.* 34, 39.

[10] Turner *v.* Hardcastle, 11 C. B., N. S. 683.

neighbourhood the surplus of the cast iron, which he did not require to use; whether he was a trader or not was held to be a question of his intention.[1]

Doubtful cases.

Whether or not there is a trading may, in doubtful cases, depend on whether the land is ancillary to the manufacture, or the manufacture to the lands.[2]

England.

Similar considerations applied in England under the Bankruptcy Act, 1869.[3] But the Bankruptcy Act, 1883, abolished the distinction in England between traders and non-traders.

b. Death [4]*—Devolution.*

Dissolution of partnership.

The death of any partner in an ordinary mine or quarry operates, it is conceived, as a dissolution of the partnership.[5]

Dower.

Dower may be due of mines or quarries wrought during the coverture.[6] And it is immaterial, in order that a right of dower may accrue, whether the mines or quarries were wrought by the husband, or by lessees for years under him; and whether such lessees paid pecuniary rents, or rents in kind; and whether the mines were under the husband's own lands, or under the lands of another person, if the husband had obtained from such other person (not a mere licence, but) a grant to take the whole stratum.[7] Dower cannot be due of mines or quarries unopened [8] during the coverture; whether under the husband's own lands, or under the lands of others; and whether such mines or quarries were left unopened by the husband, or by his lessees.[9]

[1] *Ex parte* Salkeld, 3 M. D. & De G. 125.

[2] See *Ex parte* Harrison, 1 B. C. C. 178; Wells *v.* Parker, 1 T. R. 34. Cf. Crowther *v.* Thorley, 31 W. R. 564; a case under s. 4 of the Comp. Act, 1862.

[3] See s. 4; sch. 1.

[4] It has always been necessary, that a will of mines should be executed with the same formalities as a will of surface property: see Port *v.* Turton, 2 Wils. 172. For the form of an order in an administration action for the appointment of a receiver and manager of a testator's mines, see Shale *v.* Hodson, Crockford *v.* Salmon, Set. 767. It need hardly be said, that minerals when unsevered are part of the mine or quarry containing them, and devolve with it, and not as pure personal estate: see Port *v.* Turton, *sup.*

[5] Notwithstanding the dictum to the contrary in Fereday *v.* Wightwick, 1 R. & My. 49. See Tatam *v.* Williams, 3 Ha. 355: cf. as to bankruptcy, *ante*, p. 279. See also *ante*, p. 157, n. [8].

[6] Stoughton *v.* Leigh, 1 Taunt. 402.

[7] *Ib.*

[8] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[9] Stoughton *v.* Leigh, *sup.*

Assignment of dower.

Dower may be assigned of mines or quarries either collectively with other lands, or separately of themselves.[1] It should, it has been said, be assigned by metes and bounds, if practicable: otherwise either by a proportion of profits, or by separate alternate enjoyment of the whole for short proportionate periods.[2] In assigning dower an estimate should be made of the annual value of the open [3] mines or quarries as part of the value of the estates of which the widow is dowable.[4] But it is not necessary to assign any of the open [3] mines themselves, or any portions of them. The third part in value to be assigned may consist wholly of land set out by metes and bounds, and containing none of the open [3] mines. Or any of the mines themselves may be included in the assignment; being specifically described, if the particular lands in which they lie are not also assigned. Or the enjoyment and perception of the profits of any of the particular mines may be divided.[5] However, at the present day dower is hardly ever actually assigned.

Co-owner.

On the death of any tenant in common or coparcener of a mine or quarry, his or her share devolves as real, and not as personal estate.[6]

Partner in working.

On the death of any partner in the working of a mine or quarry, who is a mere co-owner of the land itself, his share devolves as real, and not as personal, estate.[7] While, however, this is quite clear as a principle, its application to a particular state of facts often gives rise to difficulties. The parties may, for example, by the nature of their operations, leave it in doubt, whether they have not constituted themselves partners in, and altered their relations as mere co-owners of, the land. Where any such doubt arises, the test for resolving it is to be found in the answer to the question, Have the parties treated their operations as ancillary to the land, or the land as ancillary to their operations? In the former case, their relations as co-owners of the land will not have been altered. In the latter, they will. Quarrying will frequently be found to come

[1] Stoughton *v.* Leigh, *sup.*

[2] *Ib.*

[3] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[4] Stoughton *v.* Leigh, 1 Taunt. 410: see also Hoby *v.* Hoby, 1 Vern. 218.

[5] Stoughton *v.* Leigh, 1 Taunt. 410, 411.

[6] See Steward *v.* Blakeway, 6 Eq. 481, 482, *per* Lord Romilly.

[7] *Ib.*

under the former case. Such an operation as digging out iron ore, and turning it into iron bars, will usually be found to come under the latter.[1] If two or more persons are co-owners of land, and carry on a trade as ancillary to it, and out of the undivided profits of the trade purchase other land, the purchased land will, on the death of one of them, devolve as real, not as personal estate.[2]

Ordinary partner.

The share of an ordinary partner in a mine or quarry devolves, *primâ facie*, as personal estate.[3] But, of course, his interest in land will, in case an intention to that effect be clearly indicated, devolve as real estate.[4]

Mortmain.

Where mines or quarries are vested in trustees for a partnership or company in trust for the individual members in proportion to their shares, the interest of each member, although an interest in the land, may lawfully be bequeathed to a charity.[5] Shares in Irish, or Scotch, or foreign mines, were never within the policy of the Mortmain Acts.[6]

Devolution—renders—real and personal representatives.

Questions of construction have arisen under leases, whether sums payable by the lessee are in the nature of rent, and devolve upon the heir of the lessor ;[7] or constitute a mere debt, and pass to his personal representatives.[8]

Heir and remainderman.

Ore is analogous to money, and a reservation of ore or toll will go to the remainderman as money, although made payable to the lessor, his heirs and assigns.[9]

Apportionment Act.

The Apportionment Act, 1870,[10] applies to rents or royalties reserved at fixed periods.[11] But it does not apparently apply to royalties payable at uncertain times, and depending upon acts within the will and pleasure of the party who is to pay ;

[1] *Ib.* 481, *per* Lord Romilly.

[2] Steward *v.* Blakeway, 6 Eq. 479 ; 4 Ch. 603.

[3] Crawshay *v.* Maule, 1 Swanst. 508 ; Steward *v.* Blakeway, 6 Eq. 481 ; s. 22 of Partnership Act, 1890.

[4] See Balmain *v.* Shore, 9 Ves. 500.

[5] See Mortmain and Charit. Uses Act, 1891, 54 & 55 Vict. c. 73. Previously to this Act, if trustees held in trust for the individual members in proportion to their shares, no member could bequeath his share to a charity : Hayter *v.* Tucker, 4 K. & J. 243, 246 ; Entwistle *v.* Davis, 4 Eq. 272 ; which must be taken to have overruled Morris *v.* Glynn, 27 Beav. 218. But otherwise, if they held in trust for the undertaking generally : Hayter *v.* Tucker, *sup.*

[6] Baker *v.* Sutton, 1 Keen, 234. For the form of the order, see *ib.*

[7] See Barrs *v.* Lee, 33 L. J. Ch. 437.

[8] See Hatherton *v.* Bradburne, 13 Sim. 599.

[9] Campbell *v.* Leach, Amb. 748 ; see also Basset *v.* Basset, *ib.* 843.

[10] 33 & 34 Vict. c. 35.

[11] See Llewellyn *v.* Rous, 2 Eq. 27, a decision under 4 & 5 Will. 4, c. 22.

such as royalties payable upon a sale of the produce of the mine or quarry.[1]

Rent apportionment where different devolution of mine and surface.

The proper principle, on which an apportionment of rent should be made, where a man dies intestate, having been the owner in fee of a mine, and the lessee for a term of the overlying surface; and either property is valueless without the other; and the heir-at-law and administrator are desirous that both properties should be let together to the same tenant; is to assume the mine and the surface to have always been differently owned, and then to calculate what rent the mine owner would have to pay for the use of the surface.[2]

Mortmain.

Mining rents and royalties were always personalty, not realty, for the purposes of the Mortmain Acts.[3]

Devolution—minerals or their proceeds.

Where the tenant for life of a settled mine or quarry, in the exercise of his right, works it, the minerals, which by the working he has converted into chattels, devolve, on his death, on his personal representative, and not on the remainderman;[4] the tenant for life having made them his absolute property.[5]

Devolution—fixtures and movable effects.

Salt pans erected for the purposes of salt works by a tenant in fee simple, which were removable, have been held to go to the heir, and not to the executor; the salt works having been necessary for the enjoyment of the inheritance.[6] It has, however, been held, that, where a tenant for life or in tail erects a fire-engine to work his colliery, it will, on his death, devolve as personalty, and not go with the estate to the remainderman; a colliery having always been considered as a species of trade.[7] The question, whether such articles as materials laid down for making waggon-ways, or such articles

[1] St. Aubyn *v.* St. Aubyn, 1 Dr. & Sm. 611. This was a decision under 4 & 5 Will. 4, c. 22, the language of which is rents, annuities, and other payments "made payable or coming due at fixed periods." The language of the Act of 1870 (33 & 34 Vict. c. 35, s. 2) is different; being "rents, annuities, dividends, and other periodical payments in the nature of income." But "periodical payments" would probably receive the same construction as "payments at fixed periods." See, however, Set. 1768.

[2] See Guest *v.* East Dean, L. R. 7 Q. B. 342; Kittow *v.* Liskeard, 10 *ib.* 13. Cf. Ley *v.* Ley, 6 Eq. 174.

[3] Brook *v.* Badley, 4 Eq. 106.

[4] Stuart *v.* Bute, 1 Dow. 86.

[5] See *ante*, pp. 84 *et seq.* See Port *v.* Turton, 2 Wils. 172. As to lunatics, see *ante*, p. 94.

[6] Lawton *v.* Salmon, 1 H. Bl. 259, n.

[7] Lawton *v.* Lawton, 3 Atk. 13, 16; Dudley *v.* Warde, Amb. 112, 114; Ward *v.* Dudley, 57 L. T. 20: see also *ante*, p. 95, n. [5], and other cases there cited. See Wake *v.* Hall, 8 A. C. 195, 210.

as fire-engines, are fixed to the freehold, and pass therewith to the heir or remainderman; or go to the personal representative of the party erecting them; will sometimes be determined by the custom of the district in question.[1]

[1] See Lowther *v.* Cavendish, 1 Eden, 99, 118. An inquiry on the subject will, if necessary, be directed: *ib.* As to buildings and machinery erected under the Derbyshire customs, see Wake *v.* Hall, *sup.* 195, 216; p. 572 of the 3rd edition of this book. As to Scotch law, see Bain *v.* Brand, 1 A. C. 762.

CHAPTER XIV.

NEIGHBOURS—SUPPORT.

PART A.—GENERAL PRINCIPLES—NATURE OF RIGHT.

a. General Principles.

Generally.

It has been seen, that, where mines subjacent to a surface, and the surface, are differently owned; whether such ownership has always been separate, or the separation has been effected by some instrument of severance; the mines and the surface are separate tenements, and possess all the incidents of separate ownership.[1] Of course, the same principle applies, where an underlying and an overlying mineral property are differently owned.[2] And, *à fortiori*, it must apply, where mines are differently owned from a laterally adjacent surface; or where two laterally adjacent mineral properties are differently owned. Where any of these states of things exists, it is important to ascertain what the mutual rights and duties of the adjoining owners are.

Grant includes everything necessary to enjoyment of thing granted.

"When anything is granted, all the means to attain it and all the fruits and effects of it are granted also; and shall pass inclusive together with the thing by the grant of the thing itself, without the words *cum pertinentiis*, or any such-like words. *Quando aliquid conceditur conceditur etiam et id sine quo res ipsa non esse potuit.*"[3] A grant of mines, therefore, carries with it, *primâ facie*, the power to dig them.[4] And, in like manner, a grant of the surface involves, *primâ facie*, the right to have that surface preserved in its natural state.[5] And the case is precisely the same where there is an exception of

[1] See *ante*, pp. 62, 101, 102.

[2] See Mundy *v.* Rutland, 23 Ch. D. 81, 89, 96; *Re* Gerard and L. & N. W. R. Co., 1894, 2 Q. B. 915; 1895, 1 Q. B. 459.

[3] Shep. Touch. 89.

[4] *Ib.*; Rowbotham *v.* Wilson, 8 E. & B. 149, 8 H. L. C. 360; Smith *v.* Darby, L. R. 7 Q. B. 722; Ramsay *v.* Blair, 1 A. C. 703; Pountney *v.* Clayton, 11 Q. B. D. 839; Robinson *v.* Milne, 53 L. J. Ch. 1074; Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 52, 53.

[5] Pountney *v.* Clayton, *sup.*; Mid. Rail. Co. *v.* Robinson, 15 A. C. 27.

mines, or of the surface. For "what will pass by words in a grant will be excepted by like words in an exception." [1]

A man may use his property as he pleases.

And where it is not known, whether mines have been the subject of grant or of exception, but it is merely known that their ownership is in fact distinct from the ownership of adjoining property, similar principles apply. For it is a rule that every man may use his property as he pleases, and make the most of it.[2] "The general rule of law in both countries [3] is, that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract. And, as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and a servitude to prevent such an user must be founded on something more than mere neighbourhood." [4]

A man may not interfere with his neighbour's rights.

There is, however, another rule, expressed by the maxim, *sic utere tuo ut alienum non lædas*, that a man must not in the user of his property do an *injuria* to his neighbour, if it can be avoided.[5]

b. Nature of Right.

(*a*) *Generally.*

Lateral and vertical support.

Support may be lateral or vertical, or partly lateral and partly vertical. It has been often said, that there is a difference in principle between the right of lateral and the right of vertical support.[6] But it is difficult to refer to any principle applicable to the former right, which does not equally apply to the latter;

[1] Shep. Touch, 100; Cardigan *v.* Armitage, 2 B. & C. 207; Goold *v.* G. W. Deep Coal Co., 12 L. T., N. S. 844.

[2] See Crompton *v.* Lea, 19 Eq. 126: see also Rylands *v.* Fletcher, L. R. 3 H. L. 338.

[3] England and Scotland.

[4] Wilson *v.* Waddell, 2 A. C. 99, *per* Lord Blackburn.

[5] See Harris *v.* Ryding, 5 M. & W. 73; Rowbotham *v.* Wilson, 8 H. L. Cas. 360; Smith *v.* Darby, L. R. 7 Q. B. 723; Eadon *v.* Jeffcock, L. R. 7 Ex. 387, 396; Crompton *v.* Lea, *sup.*; Ramsay *v.* Blair, 1 A. C. 703; Butterknowle, &c., Co., *v.* Bishop Auckland, &c., 1906, A. C. 310, 320; Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 52, 53.

[6] See Rowbotham *v.* Wilson, 8 E. & B. 148, *per* Bramwell, B.; Rogers *v.* Taylor, 2 H. & N. 834, 835, *per* Watson, B.; Hunt *v.* Peake, Joh. 709, 710, *per* Wood, V.-C.; Richards *v.* Jenkins, 17 W. R. 31, *per* Kelly, C.B., and Martin, B. Cf. Angus *v.* Dalton, 3 Q. B. D. 120, *per* Cockburn, C.J., and Mellor, J.

and it is submitted, that the two rights depend upon precisely the same principles.[1]

Natural and non-natural state.

Support, whether lateral or vertical, may be support for land in its natural state; whether uncovered by water, or covered by water the presence of which is due to natural causes. Or it may be support for land in its non-natural state; whether artificially burdened by a building or a canal or reservoir, or artificially weakened by an excavation, or otherwise artificially altered. Between the rights to these two kinds of support there is a wide distinction in principle.

Right for land in natural state not an easement.

Where a right of support, whether lateral or vertical, exists for land in its natural state,[2] the right is not a mere easement; in the sense, at all events, of a conventional easement.[3] "In the natural state of land one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another, contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet.* All existing divisions of property in land must have been attended by this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible

[1] See Humphries *v.* Brogden, 12 Q. B. 743, 744, 746, *per* Lord Campbell; Cal. R. Co. *v.* Sprot, 2 Macq. 451, *per* Lord Cranworth; Rowbotham *v.* Wilson, *sup.* 142, *per* Watson and Martin, BB.; Bonomi *v.* Backhouse, E. B. & E. 642, *per* Erle, J.; Angus *v.* Dalton, *sup.* 99, *per* Lush, J.; Dalton *v.* Angus, 6 A. C. 791, 793, *per* Lord Selborne (see also 752, 754); Chapman *v.* Day, 47 L. T. 708, *per* Denman, J.

[2] See *post*, pp. 298—303.

[3] See Rowbotham *v.* Wilson, 8 E. & B. 124, 146, 151, 152, 155, 8 H. L. C. 348; Solomon *v.* Vintners' Co., 4 H. & N. 597; Bonomi *v.* Backhouse, E. B. & E. 636, 637, 654; Backhouse *v.* Bonomi, 9 H. L. C. 512, 513; Hunt *v.* Peake, Joh. 710; Birmingham *v.* Allen, 6 Ch. D. 287; Angus *v.* Dalton, 4 Q. B. D. 167, 184; Dalton *v.* Angus, 6 A. C. 742, 772, 791, 808; Bell *v.* Love, 10 Q. B. D. 559; Pountney *v.* Clayton, 11 Q. B. D. 838; West Leigh Colliery Co. *v.* Tunnicliffe, &c., Co., 1908, A. C. 30.

upon the principle *sic utere tuo ut alienum non lædas.*" [1] "Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by Lord Campbell in *Humphries* v. *Brogden*; [2] though when the land is in its natural state, the easement is natural and not conventional." [3]

But not an absolute right of property.

The right in question is not, however, an absolute right of property; or, at all events, an absolute right of property in the same sense as a right to prevent a trespass on one's land.[4] A surface owner, as such, has not, for instance, any right to the minerals by which his surface is supported. The property in such minerals belongs exclusively to the mine owner. And if a trespass is committed in respect of the minerals, the mine owner is the person entitled to take proceedings.[5] A surface owner, as such, cannot, moreover, insist upon the minerals being kept in their natural state.[6] The mine owner may remove every particle of his minerals, even including those immediately adjacent or subjacent to the surface, if, for the natural support which such minerals would have afforded, he substitutes artificial support.[7]

Right for land in non-natural state an easement.

Where a right of support, whether lateral or vertical, exists

[1] *Per* Lord Selborne in Dalton *v.* Angus, 6 A. C. 791.

[2] 12 Q. B. 742.

[3] Dalton *v.* Angus, *sup.* 792, *per* Lord Selborne: see also 830, *per* Lord Watson.

[4] The nature of the right has been laid down too broadly in many of the cases.

[5] Harris *v.* Ryding, 5 M. & W. 74, 76.

[6] See Bonomi *v.* Backhouse, *sup.* 655, *per* Willes, J.; Dalton *v.* Angus, *sup.* 808, *per* Lord Blackburn; West Leigh Colliery Co. *v.* Tunnicliffe, &c., Co., 1908, A. C. 29, 31, *per* Lords Macnaghten and Ashbourne.

[7] See Harris *v.* Ryding, 5 M. & W. 74, 76; Humphries *v.* Brogden, 12 Q. B. 744; Rowbotham *v.* Wilson, 8 E. & B. 157; Bonomi *v.* Backhouse, E. B. & E. 637, 655, 656; Backhouse *v.* Bonomi, 9 H. L. C. 508, 512; Eadon *v.* Jeffcock, L. R. 7 Exch. 395; Bower *v.* Peate, 1 Q. B. D. 325, 327; Lamb *v.* Walker, 3 *ib.* 396, 401; Atkinson *v.* King, I. R. 11 C. L. 541; Dalton *v.* Angus, 6 A. C. 752; Dixon *v.* White, 8 *ib.* 842; Mitchell *v.* Darley Main Colliery Co, 14 Q. B. D. 140; Darley Main Colliery Co. *v.* Mitchell, 11 A. C. 133, 134, 141, 145, 148, 149, 151; Glasgow *v.* Farie, 13 *ib.* 685; *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 470, 471; Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T., at p. 277, 278. The dicta to the contrary of Christian, L.J., in Atkinson *v.* King, 2 L. R. (Ir.) 340, 342, 344, 360, are unsustainable. Cf. the position under the Rail. & Wat. Cl. Acts, *post*, pp. 381 *et seq.*

for land in its non-natural state,[1] the right is not in any sense a right of property, but it is essentially only a conventional easement.[2] But although the two rights stand upon different footings as to the modes of acquiring them, the character of the rights, when acquired, is in each case the same.[3]

Degrees of right not measured.

Where a right of support exists, whether lateral or vertical, and whether for land in its natural state, or for land in its non-natural state, degrees cannot be measured out to which the right will extend.[4] In some cases the minerals giving the support may, as in the case of hæmatite ore, be extremely friable, and lie in irregular beds ; so as to render it impossible to calculate what extent of support may be sufficient.[5] In other cases the line dividing the adjoining lands may traverse a bed of sand, or a marsh, or a loose gravelly soil ; [6] or a bed of "running silt," [7] or brine,[8] little distinguishable from water ; so as to render it certain, that a considerable extent of support will be necessary. In other cases the minerals giving and receiving the support may, as in the case of asphalt or pitch, be of such a kind, that, if the mineral giving the support is worked, the mineral receiving the support, when thus exposed to the atmosphere, will melt and ooze away.[9] In other cases again the line dividing the adjoining land may traverse a quarry of hard stone or marble ; so as to render it certain, that a very small extent of support will be necessary.[10] Of all such questions the right is independent. It is neither affected by the nature

[1] See *post*, pp. 315—324.

[2] See Bonomi *v.* Backhouse, E. B. & E. 655 ; Backhouse *v.* Bonomi, 9 H. L. C. 503, 512. See also Partridge *v.* Scott, 3 M. & W. 220 ; Humphries *v.* Brogden, 12 Q. B. 748 ; Angus *v.* Dalton, 4 Q. B. D. 162, 169, 185, 192—196 ; Dalton *v.* Angus, 6 A. C. 763, 772, 780, 786, 788, 792, 793. See, however, *ib.* 768, 769, *per* Manisty, J.

[3] See Bonomi *v.* Backhouse, *sup.*, *per* Willes, J. ; Dalton *v.* Angus, *sup.* 792, *per* Lord Selborne, 809, *per* Lord Blackburn : see also 742, 746. Cf. Birmingham *v.* Allen, 6 Ch. D. 292, *per* James, L.J. ; 297, *per* Brett, L.J.

[4] Humphries *v.* Brogden, 12 Q. B. 745 ; Cal. R. Co. *v.* Sprot, 2 Macq. 451 ; Mundy *v.* Rutland, 23 Ch. D. 89 ; Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 602 : see *Re* Dudley, 8 Q. B. D. 93, 94, 96.

[5] See Wakefield *v.* Buccleuch, 4 Eq. 628, 638 ; Buccleuch *v.* Wakefield, L. R. 4 H. L. 405.

[6] See Cal. R. Co. *v.* Sprot, 2 Macq. 451.

[7] Jordeson *v.* Sutton, &c., Co., 1898, 2 Ch. 614, 1899, 2 Ch. 217 ; Fletcher *v.* Birkenhead Corporation, 1906, 1 K. B. 605. Affirmed, 1907, 1 K. B. 205.

[8] Salt Union, &c. *v.* Brunner, Mond, &c., 1906, 2 K. B. 822.

[9] Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 594.

[10] Cal. R. Co. *v.* Sprot, *sup.* See also N. E. R. Co. *v.* Elliot, 1 J. & H. 152 *et seq.*

of the strata,[1] nor by the difficulty of propping up the surface.[2] It is an absolute right to have the surface protected from subsidence, and kept securely at its ancient and natural level.[3]

Meaning of "neighbour."

On the same principle, the extent of the right is not necessarily limited by the land of the immediately adjoining owner. If a piece of land belonging to B., half a mile in width or depth, adjoins land of A., and is insufficient in its natural state to support A.'s land; and on the other side of such piece lies land of C., which contributes to the support of A.'s land; C. is A.'s neighbour for the purpose of questions relating to the right of support. If, on the other hand, a strip of land belonging to B., a foot only in width or depth, adjoins land of A., and is sufficient, if left in its natural state, for the support of A.'s land; and on the other side of such strip lies land of C., which (so long as B.'s land is left in its natural state) contributes in no degree to the support of A.'s land; C. cannot, in consequence merely of B. having disturbed the natural state of his (B.'s) land, become A.'s neighbour for the purpose of questions relating to the right of support.[4] The person against whom the right is exercisable is the owner of that land, the existence of which in its natural state is necessary, and is also sufficient, for the support of the land of the person entitled to support.[5]

Right independent of values of substances or of mode of working.

Again the right of support is wholly independent of the comparative values of the substance receiving and the substance giving the support.[6] Nor is it affected by the fact, that the workings of the adjacent or subjacent owner have been conducted carefully, or skilfully, or according to the custom of the country.[7]

[1] Humphries *v.* Brogden, 12 Q. B. 745; Rowbotham *v.* Wilson, 6 E. & B. 601; Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 602.

[2] Humphries *v.* Brogden, *sup.*; Rowbotham *v.* Wilson, *sup.* 602. See, however, Rowbotham *v.* Wilson, 8 H. L. Cas. 363, 364.

[3] Humphries *v.* Brogden, *sup.*; Bonomi *v.* Backhouse, E. B. & E. 657; Mundy *v.* Rutland, 23 Ch. D. 89 Trinidad Asphalt Co. *v.* Ambard, 1899' A. C. 602. As to the expression "reasonable support," in Harris *v.* Ryding (5 M. & W. 70), if inconsistent with the statements in the text, see Humphries *v.* Brogden, 12 Q. B. 751.

[4] See Birmingham *v.* Allen, 6 Ch. D. 284, 289, 293, 295, 297.

[5] See *ib.*

[6] Humphries *v.* Brogden, 12 Q. B. 745; Dalton *v.* Angus, 6 A. C. 752; Westmorland *v.* New Sharlston Co., 79 L. T. 720, 80 L. T. 846.

[7] See *ib.* See also Roberts *v.* Haines, 6 E. & B. 653; Haines *v.* Roberts, 7 *ib.* 627; Brown *v.* Robins,

Right only to prevent removal after existence as separate tenement.

The right of support is, however, only a right to prevent one's neighbour from removing the substance giving the support subsequently to the existence, as a separate tenement, of the substance receiving the support. Where the owner of the substance receiving and the substance giving the support removes the substance giving the support; and subsequently, without fraud or concealment, sells the substance receiving the support; the purchaser purchases subject to all the damage which the removal may occasion.[1] And, if, in consequence of the previous removal, although subsequently to the purchase, a subsidence takes place, a new cause of action is not thereby created.[2] Of course, however, if fraud or concealment were practised upon the purchaser at the date of the purchase, his position would be different.[3]

Right generally in respect merely of active interference.

Where a natural substance constitutes a support, the right is merely a right to prevent one's neighbour from actively interfering to remove the support. If a natural support falls away merely through the operation of natural causes, the injured person has, *primâ facie*, no right of action against his neighbour for his mere passive omission.[4] In such a case the person claiming the right must, if he wishes to prevent an injury, himself take the necessary steps.[5] And he may, if he pleases, enter for that purpose on the land of his neighbour.[6] The consequences are, however, different, if a natural support is removed, and an artificial support substituted,[7] and the artificial support is not properly maintained.

4 H. & N. 193; Hunt *v.* Peake, Joh. 710; Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454; Elliot *v.* N. E. R. Co., 10 H. L. C. 333; Davis *v.* Treharne, 6 A. C. 460, 464, 469. Cf. Aspden *v.* Seddon, 1 Ex. D. 496, 506.

[1] See Spoor *v.* Green, L. R. 9 Exch. 99 (which, however, was an action, not of tort, but of covenant); Dalton *v.* Angus, *sup.* 809. Cf. Dennett *v.* Atherton, L. R. 7 Q. B. 327.

[2] Spoor *v.* Green, *sup.*, *per* Cleasby and Bramwell, BB.; Kelly, C.B., dissenting. This is not contrary to the principle of Backhouse *v.* Bonomi, as to which, see *post*, p. 294. For that principle only applies, where, at the origin, as a separate tenement, of the substance receiving the support, the substance giving the support is still in existence. The statement in the head note of the report of Spoor *v.* Green, *sup.*, as to the application of the principle of Backhouse *v.* Bonomi, is incorrect.

[3] Spoor *v.* Green, *sup.* 107, 109. As to the effect of covenants for title, see *ante*, pp. 229, 230.

[4] See and consider Pomfret *v.* Ricroft, 1 Wms. Saund. 557; Colebeck *v.* Girdlers' Co., 1 Q. B. D. 243.

[5] See and consider Colebeck *v.* Girdlers' Co., *sup.*

[6] *Ib.*

[7] Which may be done: see *ante*, p. 290.

(β) *When Right infringed.*

Right not infringed until subsidence happens—Backhouse *v.* Bonomi.

The right of support is not infringed by mere excavations in adjacent or subjacent lands; and, although something may be done causing results which afterwards produce subsidence, the right is not infringed until the subsidence actually takes place. Thus in *Backhouse* v. *Bonomi*,[1] A. was the owner of certain houses,[2] and of the surface land on which they stood. B. was the owner of a mine under that land, and under the surrounding land. A. was entitled to have his land supported. B. worked his mine, and in so doing, left insufficient support for the houses. The houses were not damaged, nor was the enjoyment of them prejudiced, until some time after the workings had ceased. It was held, that A. was not under the Statute of Limitations bound to bring his action within six years after the workings had rendered the support insufficient; but that he was entitled to bring it at any time within six years after the mischief had happened.[3]

Or by mere apprehension of damage.

It follows, that depreciation in the value of the surface caused by the mere apprehension of future damage gives no cause of action.[4]

Each subsidence creates fresh cause of action.

It also follows, that, where the owner of land in its natural state is entitled to have it supported, each fresh subsidence caused by the removal of the support, creates, as it occurs, a fresh cause of action. Either the subsidence is itself an interference with the enjoyment of the property, and as such constitutes the cause of action.[5] Or the cause of action is the continuing omission to substitute artificial support, and the

[1] 9 H. L. C. 503, affirming Bonomi *v.* Backhouse, E. B. & E. 622.

[2] Nothing turned on the fact of houses having been upon the land: see, as to this, Angus *v.* Dalton, 4 Q. B. D. 169, 170, 185, 195.

[3] See also Spoor *v.* Green, L. R. 9 Exch. 111; Lamb *v.* Walker, 3 Q. B. D. 389; Dalton *v.* Angus, 6 A. C. 808, 830; Mitchell *v.* Darley Main Colliery Co., 14 Q. B. D. 130, 136, 137; Darley Main Colliery Co. *v.* Mitchell, 11 A. C. 133, 147, 151; West Leigh Colliery Co. *v.* Tunnicliffe, &c., 1908, A. C. 29. These cases, in effect, overrule, upon this point, Nicklin *v* Williams, 10 Exch. 259. Cf. Roberts *v.* Read, 16 East, 215; and see Rowbotham *v.* Wilson, 8 E. & B. 158; 8 H. L. C. 359, 365, 367; Bower *v.* Peate, 1 Q. B. D. 325, 327.

[4] West Leigh Colliery Co. *v.* Tunnicliffe, &c., 1908, A. C. 29, 31, 32, 33; approving the view stated by Cockburn, C.J., in Lamb *v.* Walker, 3 Q. B. D. 389.

[5] This view was favoured by Bowen and Fry, L.JJ., in Mitchell *v.* Darley Main Colliery Co., 14 Q. B. D. 137—140. See A.-G. *v.* Conduit Colliery Co., 1895, 1 Q. B. 312, *per* Collins, J.

damage which follows from that omission.[1] If the law were otherwise, the wrongdoer would be compelled to pay for consequences which he might at any moment obviate. For he would be liable at once for all damage resulting from his act, not merely past and present, but also future.[2]

Darley Main Colliery Co. *v.* Mitchell.

These propositions were laid down in *Darley Main Colliery Co.* v. *Mitchell.*[3] There the respondent was the owner of certain land and of cottages,[4] standing thereon: the appellants were the owners of the subjacent mines; and a Mr. Cooper was the owner of mines which laterally adjoined. The respondent was entitled to have his land supported. In 1867 and 1868 the appellants worked their mines; and the respondent's land in consequence subsided, and his cottages were damaged. The appellants repaired the cottages. The appellants did not afterwards work their mines; but in 1881 Cooper worked his mines. In 1882 a further subsidence of the respondent's land occurred, and his cottages were again damaged. There would not have been any further subsidence if Cooper had not worked his mines;[5] and there would not have been any subsidence from Cooper's workings, if the appellants had left sufficient support, either natural or artificial, under the respondent's land. It was held, that the cause of action in respect of the further subsidence did not arise until that subsidence occurred; and that, although more than six years had passed since the last working by the appellants, the respondent was not barred of his remedy by the Statute of Limitations.[6]

Only one action in respect of same subsidence.

On the other hand, in respect of the same subsidence, damages,

[1] See Mitchell *v.* Darley Main Colliery Co., *sup.*: see also Darley Main Colliery Co. *v.* Mitchell, 11 A. C. 133, 146, 151. As to these two views, see further, *post*, p. 445. As to substituting artificial support, see *ante*, p. 290.

[2] See Mitchell *v.* Darley Main Colliery Co., *sup.* 134, 138; Darley Main Colliery Co. *v.* Mitchell, *sup.* 127. See also West Leigh Colliery Co. *v.* Tunnicliffe, &c., 1908, A. C. 29, 31, 32, 33.

[3] 11 A. C. 127.

[4] Nothing turned on the fact of cottages having been upon the lands.

[5] See further, as to this point, *post*, pp. 304, 305.

[6] *Per* Lords Halsbury, Bramwell, and Fitzgerald, Lord Blackburn dissenting. This decision affirmed Mitchell *v.* Darley Main Colliery Co., 14 Q. B. D. 125, and overruled Nicklin *v.* Williams, 10 Ex. 259, and Lamb *v.* Walker, 3 Q. B. D. 389. See also Bonomi *v.* Backhouse, E. B. & E. 658; Backhouse *v.* Bonomi, 9 H. L. C. 503; Birmingham *v.* Allen, 6 Ch. D. 290; Brunsden *v.* Humphrey, 14 Q. B. D. 141; Tunnicliffe, &c. *v.* West Leigh Colliery Co., 1905, 2 Ch. 390; 1906, 2 Ch. 22; West Leigh Colliery Co. *v.* Tunnicliffe, &c., 1908, A. C. 27; cf. Whitehouse *v.* Fellowes, 10 C. B., N. S. 765.

as well future as past, may, and therefore should, be recovered in a single action.[1]

Meanings of "subsidences" and "cause of action" in Darley Main case.

It is frequently, however, difficult to say within which of these two principles a particular case falls. The truth is that the word "subsidence" as used in the *Darley Main* case must not be understood too strictly; and the words "cause of action," and "damage" as there used, also need some further explanation.

Crumbie *v.* Wallsend Local Board.

The principle of a fresh cause of action arising does not apply exclusively where the subsidence occurs by "fits and starts." If damage by subsidence gives rise to the cause of action, "must not fresh damage of the same kind be a fresh cause of action"? The damage of yesterday is not the damage of the "day before."[2] "The only distinction that upon the facts could be suggested between that case" (that is the *Darley Main* case), "and this is, that there the subsidence is said to have occurred by fits and starts, whereas in this case it is alleged to have gone on continuously. I do not believe that was, or could be, proved to have been the case, but I will assume that it was so. The decision of the House of Lords was to the effect that an action cannot be brought for the excavation, but a cause of action arises when damage to the plaintiff's property results therefrom by subsidence. Therefore, there is no cause of action for any such damage to the plaintiff's property until it has occurred. When a certain amount of such damage has occurred, there is only a cause of action in respect of that amount. Afterwards other damage may occur, that is to say, more of such damage may occur. There is no cause of action in respect of such further damage until it has occurred. The House of Lords held, that, where there are in such a case successive damages, a fresh cause of action arises in respect of each successive damage. That is a plain rule, and the suggested distinction is too fine for me."[3] It will be noticed that these observations were made by judges who were themselves parties to the decision in the *Darley Main* cases.[4]

[1] See Mitchell *v.* Darley Main Colliery Co., *sup.* 133, 134, *per* Brett, M.R.; Darley Main Colliery Co. *v.* Mitchell, 11 A. C. 132, 133, *per* Lord Halsbury; Tunnicliffe, &c. *v.* West Leigh Colliery Co., 1906, 2 Ch. 29, *per* Romer, L.J.

[2] Crumbie *v.* Wallsend Local Board, 1891, 1 Q. B. 507, *per* Bowen, L.J.

[3] *Ib.* 508, *per* Lord Esher.

[4] When that case was in the Court of Appeal.

" It is clear that the damage which is directly due to the existing subsidence must be assessed now once for all, and cannot be made the subject of piecemeal claims. For example, if there is good reason for holding that the subsidence has so damaged the plaintiffs' buildings on their land that these buildings will hereafter show more injury than at present appears, then that liability must be claimed for now or not at all, and cannot be made the subject of a separate claim hereafter, when that further injury is developed. And I have no doubt that there would be a good claim for present damage based on the fact of the effect of the existing subsidence to which I have above referred." [1] It is improbable that the Lord Justice, in making the latter observations, meant to say anything inconsistent with those already cited from *Crumbie's* case,[2] or with those next cited from the *Tunnicliffe* case when it was in the House of Lords. But, if read literally, some of his lordship's observations are in fact inconsistent with both.

Tunnicliffe, &c. *v.* West Leigh Co.

In *West Leigh Co.* v. *Tunnicliffe*,[3] Lord Macnaghten said : [4] " If damage is caused, the surface owner may recover for that damage, as Lord Halsbury said in the *Darley Main* case, as and when it occurs." [4] And Lord Loreburn said : [5] " I see no middle course between saying one of two things ; either a surface owner is to recover once for all for the entire diminution in the value of his property, which may arise from the fact that the mineral owner beneath him has excavated, or the surface owner can recover only for the actual physical damage so caused as and when it occurs. The former alternative would be inconvenient and capricious in its results ; but it need not be discussed, because it is excluded by authority of the highest order. The latter is affirmed as law by equally high authority." [6]

West Leigh Co. *v.* Tunnicliffe.

The right of support is not infringed unless the subsidence is substantial. There must be some real sensible interference with the land ; and interferences so slight as to come under the rule *de minimis* are not regarded.[7]

Right not infringed unless subsidence substantial.

The right of support in ordinary cases is infringed where

Right infringed

[1] Tunnicliffe *v.* West Leigh Colliery Co., 1906, 2 Ch. 29, 30, *per* Romer, L.J.

[2] *Ante*, p. 296.

[3] 1908, A. C. 27.

[4] *Ib.* p. 29.

[5] *Ib.* p. 34.

[6] See further on this subject the Scotch cases of Geddes *v.* Haldane, 13 S. L. T. 707 ; Abercorn *v.* Merry, 1909, S. C. 750.

[7] See A.-G. *v.* Conduit Colliery Co., 1895, 1 Q. B. 301, 313, *per* Collins, J.

where subsidence substantial, but damage inappreciable.

the subsidence is substantial, but the damage is inappreciable. *Smith* v. *Thackerah* [1] is a decision to the contrary.[2] But its correctness was often doubted,[3] and it is now settled that an injunction may be obtained where the subsidence is substantial, although the damage is inappreciable.[4] The right of support is analogous to a right of property ; [5] and is a right to have the surface kept securely at its ancient and natural level.[6]

Where damage to highway.

A local authority, in whom the highway becomes vested under the Public Health Acts, takes it subject to the right of working mines reserved by the High. and Locom. Am. Act, 1878, "but so, nevertheless, that in such working or getting no damage shall be done to the road or highway." [7] Generally, in respect of subsidence, such an authority is in the same position as an ordinary surface owner.[8] And it can, it is submitted, maintain an action, although the damage to the road or highway is inappreciable. Contrary opinions on the latter point were expressed in *A.-G.* v. *Conduit Colliery Co.*[9]

PART B.—PRIMÂ FACIE RIGHTS.

(*a*) *Land in Natural State.*

No evidence as to severance.

Where land is in its natural state ; and no contract, custom, or prescription is available to regulate its right to support ; and no evidence is producible as to the time or mode of its severance from the adjoining land, whether by reason of both lands having been always separate, or of nothing being known of their ownership except that it was severed at some past period ; the owner of the former land is entitled to have it supported

[1] L. R. 1 C. P. 564.

[2] See also Richards *v.* Jenkins, 17 W. R. 34.

[3] See Mitchell *v.* Darley Main Colliery Co., 14 Q. B. D. 137, *per* Bowen, L.J. ; A.-G. *v.* Conduit Colliery Co., 1895, 1 Q. B. 301, 308, 310 *et seq.*, 313, *per* Wright and Collins, JJ. In Love *v.* Bell, 9 A. C. 301, Lord Bramwell said that the owners of the minerals "might be stopped from taking anything the result of which would be subsidence of the surface."

[4] New Sharlston Co. *v.* Westmorland, 82 L. T. 725, affirming Westmorland *v.* New Sharlston Co., 79 L. T. 716, 80 L. T. 846 ; S. C. 1904, 2 Ch. 443, n. See also Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. at p. 600.

[5] See *ante*, pp. 289, 290.

[6] *Ante*, p. 292.

[7] See *ante*, p. 64.

[8] A.-G. *v.* Logan, 1891, 2 Q. B. 102, 104.

[9] See 1895, 1 Q. B. 308, *per* Wright, J. ; 313, 314, *per* Collins, J.

by the latter; whether the latter adjoin laterally,[1] or vertically.[2] In other words, every owner of land in its natural state has a *primâ facie* right to support, lateral as well as vertical; and the adjacent or subjacent owner has no right, *primâ facie*, in order to win his minerals, to withdraw such support. Accordingly, in an action for removing support from land in its natural state, the plaintiff has never been obliged to allege or prove, that he was entitled to the support; the burden, both in pleading and in proof, being upon him who asserts that the position is different from that existing as of common right.[3]

Grant with exception of mines.

Where a grant is made of land in its natural state, whether by way of conveyance in fee simple, or by way of lease, with an exception of the mines; and no provision is made with respect to support; the grantee is entitled to support as incident to his grant.[4]

[1] See 2 Rolle's Abr. 564, tit. Trespass (1), pl. 1; Com. Dig., Action upon the Case for a Nuisance (A); Hunt *v.* Peake, Joh. 705. The land in the latter case was built upon; but it was found, that, even if unbuilt upon, it would have been injured (upon which point, see *post*, p. 306). See also Wyatt *v.* Harrison, 3 B. & Ad. 871, 876; Humphries *v.* Brogden, 12 Q. B. 744; Cal. R. Co. *v.* Sprot, 2 Macq. 458; Bonomi *v.* Backhouse, E. B. & E. 636, 654; Backhouse *v.* Bonomi, 9 H. L. C. 512, 513; N. E. R. Co. *v.* Elliot, 1 J. & H. 153; Solomon *v.* Vintners' Co., 4 H. & N. 597; Murchie *v.* Black, 19 C. B., N. S. 207; Birmingham *v.* Allen, 6 Ch. D. 287; Davis *v.* Treharne, 6 A. C. 466; Mid. R. Co. *v.* Robinson, 15 *ib.* 30; Jordeson *v.* Sutton, &c., Co., 1899, 2 Ch. 243; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 291.

[2] Humphries *v.* Brogden, 12 Q. B. 739. See also Harris *v.* Ryding, 5 M. & W. 60; Smart *v.* Morton, 5 E. & B. 30, 46; Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 E. & B. 625; Cal. R. Co. *v.* Sprot, 2 Macq. 458; Rowbotham *v.* Wilson, 6 E. & B. 601, 8 E. & B. 149; N. E. R. Co. *v.* Elliot, 1 J. & H. 153; Eadon *v.* Jeffcock, L. R. 7 Ex. 388; Hext *v.* Gill, 7 Ch. 713; Atkinson *v.* King, 2 L. R. (Ir.) 332; Angus *v.* Dalton, 4 Q. B. D. 167; Davis *v.* Treharne, 6 A. C. 460, 466; Bell *v.* Love, 10 Q. B. D. 558; Dixon *v.* White, 8 A. C. 842; Pountney *v.* Clayton, 11 Q. B. D. 829, 830, 833, 838; Love *v.* Bell, 9 A. C. 289; Darley Main Colliery Co. *v.* Mitchell, 11 *ib.* 147; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424, 436, 441; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 291; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 309, 313, 315, 317.

[3] See Humphries *v.* Brogden, 12 Q. B. 741, 742. See also Lonsdale *v.* Littledale, 2 H. Bl. 267, there cited; Rowbotham *v.* Wilson, 8 E. & B. 142; Dalton *v.* Angus, 6 A. C. 809; Davis *v.* Treharne, *ib.* 466; Dixon *v.* White, 8 *ib.* 842, 843; Love *v.* Bell, 9 *ib.* 289; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424; Butterknowle, &c., Co., *v.* Bishop Auckland, &c., 1906, A. C. 309; Bull. & L. 3rd ed. 406, n. (*b*).

[4] Smart *v.* Morton, 5 E. & B. 46; Roberts *v.* Haines, 6 E. & B. 652, 654, 655; Cal. R. Co. *v.* Sprot, 2 Macq. 451; Proud *v.* Bates, 34 L. J. Ch. 406, 412; Williams *v.* Bagnall, 15 W. R. 275; Richards *v.* Jenkins, 17 *ib.* 31;

Grant in fee with exception of surface.

Where there is a grant of land in its natural state by way of conveyance in fee simple, with an exception of the surface; and no provision is made with respect to support; the law is the same.[1]

Grant for years with exception of surface.

Where the grant takes the form of a lease for years, the position is almost, although not quite, the same. A mining lease in general contemplates an immediate removal of the minerals, whereas a sale or exception may as often as not contemplate a removal at a future time. And where, as is usually the case, a royalty is reserved, the lease contemplates the removal on as large a scale as possible. The law does not disregard these differences, but does not attach much importance to them. The facts of a lease having been granted and a royalty reserved thereunder may be elements to be with others taken into consideration, in seeing whether or not the right of support is taken away. But they are insufficient of themselves to decide the question.[2]

Shafto *v.* Johnson, 8 B. & S. 252, n.; Eadon *v.* Jeffcock, L. R. 7 Exch. 388; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 288; Aspden *v.* Seddon, 10 Ch. 396, n.; *ib.* 1 Exch. D. 503; Mundy *v.* Rutland, 23 Ch. D. 96; Dixon *v.* White, 8 A. C. 847, 851; Pountney *v.* Clayton, 11 Q. B. D. 830, 840; Love *v.* Bell, *sup.* 300; Mid. R. Co. *v.* Miles, 33 Ch. D. 647; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 321; L. & N. W. R. Co. *v.* Evans, 1893, 1 Ch. 30; Ruabon, &c., Co. *v.* G. W. R. Co., *ib.* 452, 453; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 291; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 313, 317; Jary *v.* Barnsley Corporation, 1907, 2 Ch. 600. Cf. Bell *v.* Wilson, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 714; Whidborne *v.* Eccl. Comms., 7 Ch. D. 379, 381; Glasgow *v.* Farie, 13 A. C. 674, 684, 685; Mid. R. Co. *v.* Robinson, 15 *ib.* 27; G. W. R. Co. *v.* Blades, 1901, 2 Ch. 630.

[1] Davis *v.* Treharne, 6 A. C. 460: see also Dixon *v.* White, 8 *ib.* 838, n., 847, 851, 852; Westmorland *v.* New Sharlston Co., L. T. 720, 80 L. T. 846, New Sharlston Co. *v.* Westmorland, 82 L. T. 726; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 291; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 313, 317. Before Davis *v.* Treharne there was no actual decision, but the dicta in favour of the proposition greatly preponderated: see, against the proposition, Rowbotham *v.* Wilson, 8 E. & B. 149, 150, *per* Martin, B.: in favour of it, Humphries *v.* Brogden, 12 Q. B. 746, 747, *per* Lord Campbell; Rowbotham *v.* Wilson, 8 H. L. C. 360, *per* Lord Wensleydale; Dugdale *v.* Robertson, 3 K. & J. 700; Shafto *v.* Johnson, 8 B. & S. 252, n., *per* Wood, V.-C.; Richards *v.* Jenkins, 17 W. R. 31, *per* Kelly, C.B., and Martin, B.; Aspden *v.* Seddon, 1 Exch. D. 507, 509, *per* Cleasby, B., and Mellish, L.J. Cf. Eadon *v.* Jeffcock, L. R. 7 Exch. 388.

[2] See Davis *v.* Treharne, 6 A. C. 466, 467, *per* Lord Blackburn, 469, *per* Lord Watson; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 313. See also Chapman *v.* Day, 47 L. T. 705,

Overlying and underlying mines.

The principles applicable as between surface and mines equally apply as between overlying and underlying mines.[1] When, therefore, a grant is made of mines with an exception of underlying mines, neither the grantor, nor any person claiming under him, is entitled, *primâ facie*, to work the underlying mines in such a manner as to let down the overlying mines.[2] And on similar grounds when a lease was made of mines with an exception of underlying mines, it was held that the lessor could not work the underlying mines in such a way as to withdraw support from the barrier of the demised mines, and so render the demised mines liable to an influx of water from an adjoining worked-out mine.[3] At the same time there is a wide difference between the importance of support in the two cases. The withdrawal of support from a surface may mean its ruin. The withdrawal of support from an overlying seam usually involves a mere increase of cost in its working.[4]

Immaterial that workings are proper.

A mine owner cannot avoid liability by merely showing that his workings have been proper, and in the usual method.[5]

Or that profitable working is otherwise impossible.

And the mere fact that he cannot work, or cannot work at a profit, if he has to leave support, does not entitle him to remove the support.[6]

Inclosure Act.

Where mines are severed from the surface by an Inclosure Act, the same principles apply as where the severance is effected

709; Mundy *v.* Rutland, 23 Ch. D. 89; Pountney *v.* Clayton, 11 Q. B. D. 825, 832, 833, 839; Westmorland *v.* New Sharlston Co., 79 L. T. 720, 721, 80 L. T. 846. Before Davis *v.* Treharne there was a complete contradiction of dicta: see, in favour of the proposition, that a lessor must be taken, *primâ facie*, to retain the right of support, Dugdale *v.* Robertson, 3 K. & J. 695, 700; Shafto *v.* Johnson, 8 B. & S. 252, n., 254, n., *per* Wood, V.-C.; Smith *v.* Darby, L. R. 7 Q. B. 724, 725, 726, *per* Blackburn, Mellor, and Lush, JJ. against, Eadon *v.* Jeffcock, L. R. 7 Exch. 388, 390, *per* Cleasby and Martin, BB. See also Hodgson *v.* Moulson, 18 C. B., N. S. 332, where the Court evidently took the same view. See also Aspden *v.* Seddon, 10 Ch. 399, n., *per* Jessel, M.R.

[1] Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 50.

[2] Mundy *v.* Rutland, 23 Ch. D. 81, 89, 96, 97; Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 50; 1910, A. C. 386. Cf. Glasgow *v.* Hurlet Alum Co., 3 H. L. C. 25.

[3] Mundy *v.* Rutland, *sup.* 81, 90, 96.

[4] Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 48, 50, 53; 1910, A. C. 382—383, 386, 389.

[5] Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 305: see p. 308.

[6] Westmorland *v.* New Sharlston Co., 80 L. T. 846; affirmed New Sharlston Co. *v.* Westmorland, 82 L. T. 725.

by an ordinary grant.[1] An Inclosure Act is "nothing more than a statutory agreement between the parties." [2]

Wastes.

In the case of minerals under wastes, the law is different. The lord of a manor is entitled, *primâ facie*, in working minerals under the wastes, to withdraw support from the surface, provided he leaves sufficient common for his commoners.[3] However, the lord has himself the property in the surface of the wastes, as well as in the underlying minerals.[4] And, *primâ facie*, there is no limit to the exercise of his rights, except that he should leave a sufficiency of common.[5] His rights may, however, be restricted by custom.[6]

Transfer of right—generally.

It follows from the nature of the right of support, that a mere conveyance of the land to which it belongs will, in general, carry it.[7]

Corporations—generally.

And when the grantees are purchasers under statutory powers, the common law position under the pre-existing right of support is in general the same. It is clear that the position is in general the same where the purchase is voluntary; that is to say, either where no compulsory powers were ever applicable, or where they had expired.[8] And that it is in general the same, where the purchase is compulsory, is equally clear. And, even if there were otherwise a difference between the

[1] Roberts *v.* Haines, 6 E. & B. 652, 654, *per* Lord Campbell, and Coleridge and Erle, JJ.; Haines *v.* Roberts, 7 *ib.*, 626, *per* Cockburn, C.J.; Wakefield *v.* Buccleuch, 4 Eq. 649, *per* Malins, V.-C.; Buccleuch *v.* Wakefield, L. R. 4 H. L. 411, *per* Lord Chelmsford; Bell *v.* Love, 10 Q. B. D. 564, 565, 568, *per* Baggallay and Lindley, L.JJ.; Love *v.* Bell, 9 A. C. 297, *per* Lord Watson; Bell *v.* Dudley, 1895, 1 Ch. 186; Bishop Auckland, &c., Co. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424, 425, *per* Farwell, J.; 441, *per* Romer, L.J. See also N. E. R. Co. *v.* Elliot, 1 J. & H. 153, *per* Wood, V.-C.; 2 De G. F. & J. 432, *per* Lord Campbell; Elliot *v.* N. E. R. Co., 10 H. L. C. 356, 362, *per* Lords Chelmsford and Kingsdown.

[2] Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425, *per* Farwell, J.

[3] Bell *v.* Love, 10 Q. B. D. 559, 560, 561, 566; A.-G. *v.* Welsh Granite Co., 35 W. R. 617; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 308, 319. Consett Waterworks Co. *v.* Ritson contains an erroneous dictum to the contrary: see 22 Q. B. D. at p. 329, *per* Cave, J.

[4] See *ante*, pp. 69, 109.

[5] See Bell *v.* Love, *sup.*; *ante*, pp. 109, 110.

[6] See and consider the reference to the special case in Bell *v.* Love, *sup.* 561.

[7] See N. B. R. Co. *v.* Turner, 6 F. at pp. 912—913; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. at 295; 1906, 2 Ch. 564.

[8] See Manchester Corporation *v.* New Moss Colliery Co., 1906, 2 Ch. 278; New Moss Colliery Co. *v.* Manchester Corporation, 1908, A. C. 117: see the facts stated, *post*, pp. 397, 398, 936.

two cases, it would, when compulsory powers exist, be immaterial, whether the landowners put the grantees to the actual exercise of their powers, or yielded without doing so. In either case he sells because he must.[1]

Corporations —effect of "code" applying.

And when "the code" under the Rail. or Wat. Cl. Act applies,[2] the position under the pre-existing right of support also applies, subject only to the code, and so far as it does not extend.[3] As regards both railways and waterworks, therefore, it applies inside the distance specified in sections 78 of the Rail. Cl. Act, and section 22 of the Wat. Cl. Act,[4] where the substance giving the support, as, *e.g.*, clay or stone common in the district, is (*a*) not under the land purchased, and (*b*) not a "mineral"[5] within the statutory words.[6] And as regards waterworks, if a notice of intention to work inside the prescribed distance is given, and a counternotice is not given, the parties will be remitted to their position under the pre-existing right.[7] And as regards both railways and waterworks the pre-existing right applies outside the prescribed distance.[8] It was, however, decided in one case in the Court of Appeal,[9] and stated by one member of the Court of Appeal in a subsequent case,[10] that as regards railways the pre-existing right inside the prescribed distance was replaced by the code. All these propositions are subsequently dealt with in more detail.[11]

Transfer of obligation.

Where, upon a severance of titles, the surface owner has the right of support, a subsequent purchaser or lessee from the mine owner cannot, as against the right, shelter himself under a plea of want of notice.[12]

[1] See Fletcher *v.* G. W. R. Co., 5 H. & N. 697, *per* Cockburn, C.J.; Hooper *v.* Bourne, 3 Q. B. D. 273, *per* Bramwell, L.J.; Manchester Corporation *v.* New Moss Colliery Co., 1906, 1 Ch. 289, 290, *per* Farwell, J.; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at 100, 101, *per* Eve, J.

[2] As to which, see *post*, pp. 369 *et seq.*

[3] See the cases referred to in notes 6—10.

[4] See *post*, pp. 371, 375.

[5] See *ante*, pp. 45, 46.

[6] See L. & N. W. R. Co. *v.* Ackroyd, 31 L. J. Ch. at p. 590; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at p. 110. See also *post*, p. 424.

[7] See Manchester Corporation *v.* New Moss Colliery Co., 1906, 2 Ch. 564; New Moss Colliery Co. *v.* Manchester Corporation, 1908, A. C. 117: see also *post*, pp. 396 *et seq.*

[8] See S. C.; and cf. L. & N. W. R. Co. *v.* Howley Park, &c., Co.: see also *post*, pp. 393, 404.

[9] See Pountney *v.* Clayton, 11 Q. B. D. 820: see also *post*, p. 400.

[10] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., *sup.* at p. 121, *per* Moulton, L.J.; see also *post*, pp. 402 *et seq.*

[11] See the references to subsequent pages in the five preceding notes.

[12] Mundy *v.* Rutland, 23 Ch. D. at

(β) *Land in Non-natural State.*

Land artificially burdened.

Where land has been artificially burdened by a building; and no contract or prescription is available to regulate its right to support; no right of support, lateral or vertical, exists for the building.[1] And, of course, the same principle applies to the case of a railway, tramway, or roadway; or of an artificial basin, reservoir, canal, or watercourse.[2] And where a right of support for an artificial weight has been acquired by way of easement,[3] no right of support exists, *primâ facie*, for any increase to that weight; whether caused by actual additions,[4] or by mere internal structural alterations.[5] Accordingly, in an action for removing support from land artificially burdened, the plaintiff has always been obliged, as a matter of pleading, to allege that he was entitled to have the weight supported.[6] It is not necessary to allege the grounds upon which the plaintiff is entitled to support.[7]

Land artificially weakened.

A similar principle applies where, instead of the natural weight of the land being increased by having anything put upon its surface, its self-sustaining power is weakened by reason of excavations being made under or horizontally adjacent to its surface.

Immaterial whether excavations made by owner or third party.

And, for this purpose, it is immaterial whether the excavations are made by the owner of the land,[8] or by a third

90, 91: see White's Trustees *v.* Hamilton, 14 R. 597.

[1] Wilde *v.* Minsterley, 2 Rolle's Abr. 564, tit. Trespass I. pl. 1; Palmer *v.* Fleshees, 1 Sid. 167; Stansell *v.* Jollard, cited in 1 Selw. N. P. 11th ed. 457; Wyatt *v.* Harrison, 3 B. & Ad. 871; Partridge *v.* Scott, 3 M. & W. 220; Jeffries *v.* Williams, 5 Exch. 800; Rogers *v.* Taylor, 2 H. & N. 828; Hunt *v.* Peake, Joh. 705; N. E. R. Co. *v.* Elliot, 1 J. & H. 153; Dalton *v.* Angus, 6 A. C. 753, 772; Mid. R. Co. *v.* Robinson, 15 *ib.* 30. Slingsby *v.* Barnard, 1 Rolle's R. 430, pl. 24, so far as it is inconsistent with the proposition in the text, cannot be upheld: see Dalton *v.* Angus, *sup.* 742, 743.

[2] See Cal. R. Co. *v.* Sprot, 2 Macq. 449; Stourbridge Canal Co. *v.* Dudley, 3 E. & E. 417, 426 (as to the dam).

[3] See *post*, pp. 315—324.

[4] See Murchie *v.* Black, 19 C. B., N. S. 205, 206.

[5] Angus *v.* Dalton, 4 Q. B. D. 162; affirmed Dalton *v.* Angus, 6 A. C. 740. Cf. G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 157.

[6] See Humphries *v.* Brogden, 12 Q. B. 748; Rogers *v.* Taylor, 2 H. & N. 828; Bull. & L. 3rd ed. 406, n. (*b*). Cf. as to land in its natural state, *ante*, p. 299.

[7] Rogers *v.* Taylor, 2 H. & N. 828. Hilton *v.* Whitehead (12 Q. B. 734), in which the contrary is laid down, was decided before the C. L. P. Act of 1852. See the observations upon this case in Rogers *v.* Taylor, *sup.*

[8] Partridge *v.* Scott, 3 M. & W. 220; Birmingham *v.* Allen, 6 Ch. D. 293, 296.

party.[1] Thus, if the ownership of the surface and the subjacent mines is in different hands; and the subjacent owner works out his mines, not so as to cause the surface to subside, but so as to put a weight upon a lateral owner, which he would not otherwise have to bear; and the lateral owner subsequently works out his mines; and the surface owner's land then subsides; the lateral owner is not, *primâ facie*, liable. So, if, between the land of a first owner and that of a third owner, lies land belonging to a second owner; and such intervening land, if it had been allowed to remain unexcavated, would have been sufficient to support the first owner's land; and the second owner works out the mines under his land; and the weight of support is thus put upon the third owner's land; the third owner cannot, *primâ facie*, be prevented from subsequently working his mines, although the first owner's land may in consequence subside.[2] For the natural state of the first owner's land would, in the latter case, include the benefit which it derived from the support of the intervening land. Indeed, the third owner would not, in such a case, be the first owner's neighbour for the purpose of questions relating to support.[3] And the mere fact that the lateral or third owner knew of the excavations will not make him liable. The contrary has no doubt been stated;[4] but the statement is inconsistent with the preceding propositions, and cannot be considered law.[5]

Immaterial that excavations made by defendant if entitled to make them.

For the above-mentioned purpose it is also immaterial that the excavations are made by the defendant himself provided he is entitled to make them. Thus, where the owner of mines both vertically and laterally adjacent to a surface had contracted for the right to deprive the surface of its vertical support; and, in pursuance of such right, proceeded to work out the subjacent mines; and, at the same time, proceeded to work out the adjacent mines; it was held, that he was under no obligation to bear the additional weight, which would from

[1] Birmingham *v.* Allen, 6 Ch. D. 284, 288 *et seq.*

[2] *Ib.*; Darley Main Colliery Co. *v.* Mitchell, 11 A. C. 146.

[3] Birmingham *v.* Allen, *sup.* 289, 293, 297, *per* Jessel, M.R., and James and Brett, L.JJ. See Dalton *v.* Angus, 6 A. C. 755, 827. See *ante*, p. 292. For the effect as to the person liable, see *post*, pp. 443, 444.

[4] See Brown *v.* Robins, 4 H. & N. 186.

[5] See *ib.* 194, *per* Martin, B.

time to time be thrown on the adjacent land, according as the vertical support was being removed.[1]

Other cases of artificial alteration.

And the principle is not confined to cases of artificial burdening or artificial weakening. It may apply to a canal made through land excavated for the purpose. For, although the weight of the new structure may be less than that of the soil which previously occupied its place, "a dangerous species of property" is introduced.[2]

Principle of Brown *v.* Robins.

However, even if land is in its non-natural state, a right still remains, *primâ facie*, for such a degree of support as its owner would have been entitled to, if it had remained in its natural state. Therefore, where land, which has been built upon, is damaged through the withdrawal of its support, its owner will, if he can prove that it would have been damaged even in its natural state, be entitled, *primâ facie*, to a remedy.[3]

Its application to alteration of non-natural state.

Similarly, where a company acquired a statutory right of support for a horse-tramway; and a subsequent Act vested the tramway in the plaintiff company, with power to alter it into a railway of the modern type; and it was altered accordingly; and it was subsequently damaged through the withdrawal of its support; and it was proved that the tramway would have been damaged, if it had been allowed to continue; the plaintiff company were held entitled to a remedy.[4]

Consequent liability for injury to new burden.

It follows that, if support is withdrawn from land which has been built upon; and the building is injured; and it is shown that the land would have been injured, even in its natural state; the remedy, to which the injured party is entitled, cannot be confined to the injury to the land. He will also be entitled to recover in respect of the injury to the building.[5] And if he has suffered a consequential injury to his trade, in

[1] See Williams *v.* Bagnall, 15 W. R. 272, 276. Under the terms of the contract the mine owner was precluded from entering on the surface, and was therefore compelled to work from the adjoining property; but the decision was independent of this fact. Cf. Woodall *v.* Hingley, 14 L. T., N. S. 167.

[2] See Staffordshire Canal Co. *v.* Hallen, 6 B. & C. 321, *per* Bayley, J.

[3] Brown *v.* Robins, 4 H. & N. 186; Hunt *v.* Peake, Joh. 712; Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454; Bell *v.* Love, 10 Q. B. D. 547, 570; Jordeson *v.* Sutton, &c., Co., 1898, 2 Ch. 625: and see Backhouse *v.* Bonomi, 9 H. L. Ca. 503.

[4] See G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 157.

[5] Brown *v.* Robins, *sup.* 186; Hunt *v.* Peake, Joh. 713; Stroyan *v.* Knowles, Hamer *v.* Knowles, *sup.*; Richards *v.* Jenkins, 17 W. R. 34; Chapman *v.* Day, 47 L. T. 705; A.-G. *v.* Conduit Coll. Co., 1895, 1 Q. B. 312.

respect of this also he will be entitled to recover.[1] And it is not open to the wrong-doer to contend, that the trade should have been immediately discontinued, to prevent an aggravation of the injury.[2] Had it not been for the wrong-doer's unlawful act there would have been no injury at all.[3]

Where artificial alteration follows transfer of pre-existing right.

Of course the principle of *Brown* v. *Robins* equally applies where a pre-existing right of support has been already acquired by a mere conveyance of the land to which it belongs ;[4] whether the grantee is an individual, or a Rail. Co. or other corporation.[5]

Liability for negligence.

It is probable that the owner of land in its non-natural state may, *primâ facie,* make an adjoining owner liable for removing support, if the removal has been done negligently.[6] Analogy is in favour of this view. The owner of land in its natural state, whose right to support has been excluded, is, for example, entitled to a remedy, if the adjoining owner has worked negligently, or contrary to the custom of the country.[7] And in many of the cases, which in other respects ascertain the relative rights and duties of adjoining owners, the presence or absence of negligence on the part of the defendant has been deemed material.[8]

Value of land not entitled to have artificial weight supported.

Although an owner of land, who puts an artificial weight upon it, is not entitled, *primâ facie,* to have such weight supported,[9] he is entitled, *primâ facie,* to put the weight upon it in the first instance.[10] It follows, that, where the owner of land is not entitled to have an artificial weight thereon supported, and the value of the land has for any purpose to be estimated, it is not necessarily estimable with reference merely to the purposes to which the land can be applied in its natural

[1] See Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454: see also *post,* pp. 447, 448.

[2] See *ib.* p. 465.

[3] See Brown *v.* Robins, 4 H. & N. 186.

[4] See *ante,* pp. 302 *et seq.*

[5] See Manchester Corporation *v.* New Moss Colliery Co., 1906, 2 Ch. 278; New Moss Colliery Co. *v.* Manchester Corporation, 1908, A. C. 117: see the facts stated, *post,* pp. 397, 398.

[6] See Dudley Canal Co. *v.* Grazebrook, 1 B. & Ad. 65; Woodall *v.* Hingley, 14 L. T., N. S. 167. Angus *v.* Dalton (4 Q. B. D. 204) contains an opinion of Brett, L.J., to the same effect.

[7] See *post,* pp. 311, 312.

[8] See Smith *v.* Kenrick, 7 C. B. 515; Eadon *v.* Jeffcock, L. R. 7 Exch. 395; Smith *v.* Fletcher, 9 *ib.* 64, 67; Crompton *v.* Lea, 19 Eq. 127, 129. Cf. the language of s. 79 of Rail. Cl. Cons. Act, 1845, *post,* p. 372, s. 23 of Wat. Cl. Act, *post,* p. 376, and s. 4 of the Pub. Health Am. Act, 1883, *post,* p. 379.

[9] See *ante,* p. 304.

[10] See Mordue *v.* Durham, L. R. 8 C. P. 336; Dalton *v.* Angus, 6 A. C. 796.

state. It may be estimable with reference to any purpose to which the land might be reasonably considered as applicable.[1]

Railway or canal Act.

The principles which, *primâ facie*, determine the right of support for land in its non-natural state, do not exclusively apply, where the instrument of severance is voluntary. They equally apply, where it has been entered into under the provisions of a railway, or canal, or similar Act.[2]

Where other artificial structure of same owner entitled to support.

The owners of two artificial structures, *e.g.* water pipes, one of which they are entitled to have supported, but the other of which they are not, may incidentally complain of workings to the injury of the latter, if they will also injure the former.[3]

PART C.—VARIATION OF PRIMÂ FACIE RIGHTS.

SECT. 1.—EXCLUSION OF RIGHT FOR LAND IN NATURAL STATE.

(*a*) *Contract.*

Exclusion by contract.

If apt words are used; whether in the instrument of severance itself;[4] or in a contemporaneous, or a subsequent instrument;[5] and whether in affirmative or negative terms;[6] and whether in express terms or by necessary implication;[7] and

[1] Mordue *v.* Durham, L. R. 8 C. P. 336: see further, as to this case, *post*, pp. 456, 457. Cf. the Sc. case of Neill's Trustees *v.* Dixon, 7 R. 741; a decision on the meaning of "surface damage."

[2] See *ante*, p. 302, n. [1], and cases there cited.

[3] See Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T. 275. There was an implied right of support for the former, as to which see *post*, pp. 316 *et seq.*

[4] See Rowbotham *v.* Wilson, 6 E. & B. 593; 8 *ib.* 123; 8 H. L. C. 348; Shafto *v.* Johnson, 8 B. & S. 252, n.; Taylor *v.* Shafto, *ib.* 228; Murchie *v.* Black, 19 C. B., N. S. 207; Williams *v.* Bagnall, 15 W. R. 272; Buccleuch *v.* Wakefield, L. R. 4 H. L. 377; Smith *v.* Darby, L. R. 7 Q. B. 716; Eadon *v.* Jeffcock, L. R. 7 Exch. 379; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 238; Aspden *v.* Seddon, 10 Ch. 396, n., 401; *ib.* 1 Exch. D. 496; Gill *v.* Dickinson, 5 Q. B. D. 159; Davis *v.* Treharne, 6 A. C. 466, 469; Dalton *v.* Angus, *ib.* 809; Chapman *v.* Day, 47 L. T. 709; Mundy *v.* Rutland, 23 Ch. D. 81, 88, 89; Bell *v.* Love, 10 Q. B. D. 558; Dixon *v.* White, 8 A. C. 838, n.; Pountney *v.* Clayton, 11 Q. B. D. 829, 838, 839; Love *v.* Bell, 9 A. C. 289; Darley Main Colliery Co. *v.* Mitchell, 11 *ib.* 147; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 321; L. & N. W. R. Co. *v.* Evans, 1893, 1 Ch. 30. This in fact is admitted in Harris *v.* Ryding, 5 M. & W. 60; Humphries *v.* Brogden, 12 Q. B. 745, 757; Smart *v.* Morton, 5 E. & B. 30, 46.

[5] See Rowbotham *v.* Wilson, 6 E. & B. 604; 8 *ib.* 147; Murchie *v.* Black, 19 C. B., N. S. 205. Cf. Richards *v.* Harper, L. R. 1 Exch. 205.

[6] See Smith *v.* Darby, L. R. 7 Q. B. 724, *per* Blackburn, J.

[7] See *ib.* 725; Aspden *v.* Seddon, 10 Ch. 401; Davis *v.* Treharne, 6 A. C. 469; Dixon *v.* White, 8 *ib.* 839, n., 841, n., 843, 847, 850; Twyerould *v.* Chamber Coll. Co., W. N. 1892, p. 27;

whether the mines are granted or excepted ; [1] and whether the instrument is one *inter partes* or (what is substantially the same) an Inclosure Act ; [2] the right of support for land in its natural state may be effectually excluded. And of course the right may be partially [3] as well as wholly excluded. The question is in every case one of construction of the instrument.[4]

Meaning of necessary implication.

And, as regards "necessary implication," it is not the duty of the Court to construe the instrument without reference to any evidence. The science and practice of mining as followed at the date when the title was severed may be regarded in ascertaining the construction of the instrument of severance.[5] The implication may also be found from the circumstances in which the instrument was executed, and the object which the parties had in view appearing from those circumstances.[6] "By necessary implication I understand that which the Courts infer from relevant admissible evidence for the purpose of giving to the transaction such efficacy as must have been intended by business men entering into such a transaction." [7]

Dictum of Lord Denman.

The exclusion of the right was formerly supposed to be impossible, as appears from the dictum of Lord Denman in *Hilton* v. *Granville* : [8]—"Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." [9] There is not, however,

Bell *v.* Dudley, 1895, 1 Ch. 186 ; Westmorland *v.* New Sharlston Co., 79 L. T. 720 ; New Sharlston Co. *v.* Westmorland, 82 L. T. 726, 1904, 2 Ch. 443, n. ; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424, 425, 441 ; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 309, 313, 315.

[1] See Williams *v.* Bagnall, 15 W. R. 274, 275, 276 ; Dixon *v.* White, 8 A. C. 842, 843, 847.

[2] Buccleuch *v.* Wakefield, L. R. 4 H. L. p. 377 ; Bell *v.* Love, 10 Q. B. D. 558, 566 ; Love *v.* Bell, 9 A. C. 297 ; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 321, 702 ; Bell *v.* Dudley, *sup.* ; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., *sup.*

[3] See Brewer *v.* Rhymney Iron Co., 1910, 1 Ch. 766, cited *post*, p. 340. In Mundy *v.* Rutland, 23 Ch. D. 81, Kay, J., thought that the provisions of a lease (stated *post*, pp. 334, 335) partially excluded the right of support. The Court of Appeal thought that they were unintelligible.

[4] Dixon *v.* White, 8 A. C. 843, 851 ; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425.

[5] See Dixon *v.* White, 8 A. C. 838, n., *per* Lord President Inglis ; Butterley Co. *v.* New Hucknall Co., 1910, A. C. 386—387, *per* Lord Macnaghten.

[6] Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 37, 46, 49, 51, 52—55 ; 1910, A. C. 381, 387, 388.

[7] S. C. 1909, 1 Ch. 51, 52, 53, *per* Farwell, L.J.

[8] 5 Q. B. 701.

[9] See p. 730.

in fact, any repugnancy ; [1] and the dictum has been long since overruled.[2]

Contract for benefit of antecedent lessee.

A proviso in a purchase deed, that the vendor, his heirs or assigns, "tenants or lessees," should not be liable for any damage caused by the sinking of the land through mining operations in getting "the minerals hereby excepted," has been held to enure for the benefit of a lessee holding under an antecedent lease, where the lease was recited in the deed, and the minerals comprised in the lease were part of the minerals excepted from the purchase.[3]

Express contract as to other mines or surface.

An owner of land in its natural state, whose right of support is excluded by contract, may nevertheless be entitled to a remedy, if the damage which he sustains has been occasioned by workings outside the contract. If, for example, upon a sale or lease of land the mines are excepted, with liberty to get them without being liable for subsidence ; and the mine owner is also the owner of mines which laterally adjoin ; and he does not work the excepted mines, but works the lateral mines ; and the land sold or demised subsides in consequence ; he may be liable.[4] On the other hand, if, upon a sale of land, the mines are excepted, with a like liberty ; and the surface owner is also the owner of land which laterally adjoins ; and the mine owner works; and the lateral land subsides in consequence ; the mine owner may be liable.[5]

Whether covenant as to non-liability for damage runs with land.

It is sometimes a question, whether the burden of a covenant as to non-liability for damage runs with the land. In *Rowbotham* v. *Wilson*,[6] allottees of the surface, who were parties to

[1] See Rowbotham *v.* Wilson, 6 E. & B. 603, 8 H. L. C. 361, 362 ; Salisbury *v.* Gladstone, 9 H. L. C. 703 ; Williams *v.* Bagnall, 15 W. R. 276.

[2] See Rowbotham *v.* Wilson, 8 H. L. C. 348. See also Carlyon *v.* Lovering, 1 H. & N. 799 ; Buccleuch *v.* Wakefield, L. R. 4 H. L. 399, 410 ; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 297 ; Hall *v.* Byron, 4 Ch. D. 678 ; Bell *v.* Love, 10 Q. B. D. 561 ; Dixon *v.* White, 8 A. C. 843.

[3] See Eadon *v.* Jeffcock, L. R. 7 Exch. 379, 397, 398, *per* Bramwell, B. Cf., on this point, Davis *v.* Treharne, 6 A. C. 460 ; *post*, p. 334, n. [6] ; Dixon *v.* White, 8 *ib.* 833 ; see pp. 846, 847, 849. Cf. Pringle *v.* Carron, 7 F. 820.

[4] See Whitehouse *v.* Bayley, 34 L. T. 93 ; Aspden *v.* Seddon, 1 Ex. D. 505. In Whitehouse *v.* Bayley, the plaintiff's buildings were damaged, but the land would have been damaged even if unbuilt upon : see as to this, *ante*, pp. 306, 307. He might have been free from liability, if he had postponed the working of the lateral mines until after he had worked the excepted mines : see *ante*, pp. 305, 306.

[5] See Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 278.

[6] 8 H. L. C. 348, affirming S. C. 8 E. & B. 123, which affirmed S. C. 6 *ib.* 593.

an award under an Inclosure Act, covenanted that the allottees of the mines, who were also parties, their heirs and assigns, should be at liberty to work the mines, and should not be liable to an action for any sinking of the surface. It was held, that the covenant, although nominally such, was in effect a grant of a right to disturb the surface; and that the successor in title of the surface owner was not, therefore, entitled to maintain an action for removing the support.[1] The decision was different in *Richards* v. *Harper*,[2] where the purchaser of copyhold land, by a deed of even date, covenanted and granted, that the vendor and his heirs might work the mines in an adjoining freehold without being liable to make compensation for any injury caused by such working to the copyhold; and the deed was not entered on the court rolls, or referred to in the surrender; and the copyhold was afterwards enfranchised, and resold; and neither the lord of the manor, nor the sub-purchaser, had notice of the deed.[3]

Whether covenant as to liability for damage runs with land.

It has been already seen that the benefit of a covenant to make compensation for damage by subsidence runs with the land.[4] And when an instrument, which excludes the right of a surface owner to support, provides that he shall be compensated for all damage which he may thereby sustain, the proviso, whether in the form of a covenant or not, also applies to covenants not running with the land. It is an inherent qualification of the right to work, and binds the mine owner for the time being in favour of the surface owner for the time being.[5]

The proviso sometimes imposes liability in respect of workings under a lease granted by a predecessor in title.[6]

Liability in respect of prior lease, Liability through negligence, &c.

When an instrument excludes the right of the surface owner to support, the mine owner may be liable, if he works negligently, or contrary to the custom of the country.[7] "Wanton, reckless,

[1] See 8 H. L. C. 362, *per* Lord Wensleydale. See Bell *v.* Love, 10 Q. B. D. 562.

[2] L. R. 1 Exch. 199.

[3] Pollock, C.B., rested his decision on the fact, that the land in question had been originally copyhold: but the majority of the Court (Martin, Channell and Pigott, BB.) were of opinion, that the result would have been the same if the land had been freehold.

[4] *Ante*, pp. 254, 255.

[5] Aspden *v.* Seddon, Preston *v.* Seddon, 1 Exch. D. 496; Chamber Coll. Co. *v.* Twyerould, H. of L., 20 July, 1893, *per* Lord Watson. The facts of this case are stated, *post*, p. 339: see also Dixon *v.* White, 8 A. C. 842, 843, 850; *Re* Donegal, W. N. 1888, p. 112, cited *post*, p. 466.

[6] Berkley *v.* Shafto, 15 C. B. N. S. 79: see p. 97.

[7] See Rowbotham *v.* Wilson, 6 E. &

or improper" working is not within the view of either party.[1]

Subsequent acquisition by prescription.

When an instrument excludes the right of the surface owner to support, the right cannot, apparently, be subsequently acquired by prescription.[2] It would be impossible in such a case to show an enjoyment as of right.

Effect on building covenant of reserved right to withdraw support.

Where a lease was granted, subject to an exception of mines, and to a power to the mine owner to destroy the surface by withdrawing support therefrom and otherwise; and the lease contained a covenant by the lessee to build; the covenant was held not to be extinguished by the existence of the power.[3]

(β) *Statute.*[4]

Railways Clauses Act and Waterworks Clauses Act.

The right of support for land in its natural state may also be excluded, wholly or in fact, by statute. Examples of partial exclusion are afforded by the Rail. Cl. Cons. Act, 1845, and the Wat. Cl. Cons. Act, 1847.[5]

Gasworks Clauses Acts —Nuisance.

The mere statutory authority to execute their works, which is vested in a gas company subject to the provisions of the Gasworks Clauses Acts, 1847 and 1871,[6] does not entitle them, in executing their works, to remove support; the liability to proceedings for a "nuisance" caused in the execution of the works being expressly preserved.[7]

Irish Acts.

In Ireland a general statutory power to work mines and minerals excepted from a lease was conferred by 10 Geo. 1, c. 5, s. 4. A subsequent Act of 11 Geo. 2, c. 10 declared that the former Act applies to coal-mines.[8] Section 4 was repealed and substantially re-enacted by sections 104 and 32 of 23 & 24 Vict. c. 154 (Deasy's Act). The Irish Courts appear to have

B. 593, 602; 8 *ib.* 123; 8 H. L. C. 348; Eadon *v.* Jeffcock, L. R. 7 Exch. 393, 394. Cf. Smith *v.* Kenrick, 7 C. B. 515; Smith *v.* Fletcher, L. R. 9 Exch. 64, 67; Crompton *v.* Lea, 19 Eq. 127, 129.

[1] Buchanan *v.* Andrew, L. R. 2 Sc. & D. 292, *per* Lord Selborne; see also 296, *per* Lord Chelmsford.

[2] This question was suggested in Rowbotham *v.* Wilson, 6 E. & B. 593.

[3] Molyneux *v.* Richard, 1906, 1 Ch. 34.

[4] As to Inclosure Acts, see *ante*, p. 302.

[5] See *post*, p. 369 *et seq.*; and Pountney *v.* Clayton, 11 Q. B. D. 829, 838.

[6] 10 & 11 Vict. c. 15, s. 29; 34 & 35 Vict. c. 41, s. 9.

[7] Jordeson *v.* Sutton, &c., Gas Co., 1899, 2 Ch. 217.

[8] See also *post*, pp. 463, 464.

construed these Acts as conferring a power not only to enter upon the surface of the demised lands, but also to cause subsidence.[1]

(γ) *Custom and Prescription.*

Exclusion by custom on terms of compensating.

The right of support for land in its natural state may also apparently be excluded by custom, if it is a part of the custom that compensation shall be made for all damage.[2] Of course the existence of the custom must be conclusively proved.[3]

Hilton v. Granville.

In *Hilton* v. *Granville* [4] an action was brought by a copyholder against his lord's lessee for working minerals under the copyhold parcel in such a way as to withdraw support therefrom; and from two ancient copyhold houses, which had been built thereon.[5] Two pleas were, amongst others, put in; which have been usually treated as pleas of a prescriptive right so to work without making any compensation for the damage to be done, and of a custom so to work from time immemorial without making any compensation. Both pleas were held bad.

Observations on Hilton v. Granville.

This decision was treated as sound in *Salisbury* v. *Gladstone*,[6] was acted on in *Blackett* v. *Bradley*,[7] and was approved in *Bell* v. *Love*.[8] And what is perhaps of greater importance is this:—The pleas did not in terms allege a right to let down the surface. All they alleged were wide powers of working. These would not have authorised a letting down, if the question

[1] Fishbourne *v.* Hamilton, 25 L. R. (Ir.) pp. 497, 508; Staples *v.* Young, 1908, 1 I. R., p. 143.

[2] See Aspden *v.* Seddon, 1 Exch. D. 509, 510, *per* Mellish, L.J. See also the observations of Lord Hatherley in Buccleuch *v.* Wakefield, L. R. 4 H. L. 395, 396, 399: and see Love *v.* Bell, 9 A. C. 297, *per* Lord Watson. Cf. Smart *v.* Morton, 5 E. & B. 30. There a custom to work so as to let down the surface, paying compensation for the injury so caused, was alleged to exist at the time of the injury complained of. The plea of such a custom was held bad; but upon the ground, that the existence of the custom was not sufficiently proved.

[3] Shafto *v.* Bolckow, coram Kekewich, J., 9 May, 1888.

[4] 5 Q. B. 701.

[5] The principle of the decision was not affected by the fact that houses were upon the land. The pleas were not confined to newly built houses, but were so wide as to embrace houses coeval with the custom itself; as to which a grant of the right of support would, in the absence of the custom, be implied: see *post*, p. 316.

[6] 9 H. L. C. 692, 702.

[7] 1 B. & S. 940. The custom alleged in this case was, however, a custom to work under a waste; to which different considerations apply: see, as to this, *post*, pp. 314, 315.

[8] 10 Q. B. D. 561, *per* Baggallay, L.J.

had arisen under a grant.[1] And if there is any difference between claims resting on grant and those resting on custom, it is in the direction of dealing with the latter more strictly than the former. "Though the parties may legally have made such a contract, it would not be reasonable to presume that they had done so."[2] However, the correctness of *Hilton* v. *Granville*, as a decision that a custom to work so as to let down the surface is invalid, is hardly consistent with many of the observations of Lord Cottenham, when the same case was in Chancery;[3] and certainly was not treated as being beyond doubt in *Buccleuch* v. *Wakefield*.[4]

Conditions of validity of custom.

If a custom to disturb the surface without paying compensation can be considered good, it must, at all events, be conclusively shown to exist;[5] and to have existed at the time when the severance of the adjoining tenements took place.[6]

Prescription and custom on similar footing.

No reason exists why the remarks applicable to a custom should not equally apply to a prescriptive right so to work as to disturb the surface.[7]

Freeholds and copyholds.

And as regards the validity of a plea of right by custom or prescription to withdraw support from a surface, there is no distinction between freeholds and copyholds.[8]

Wastes.

In *Blackett* v. *Bradley*[9] the custom alleged was to work under the waste lands of a manor without paying compensation for subsidence. The distinction between that custom and the custom alleged in *Hilton* v. *Granville*[10] was not pointed out; and, in deciding the case, the Court assumed, that it was not distinguishable from *Hilton* v. *Granville*, and gave judgment in accordance with that decision. The real nature of the

[1] See *post*, p. 328.

[2] See Blackett *v.* Bradley, 1 B. & S. 953, *per* Blackburn, J.; Bell *v.* Love, 10 Q. B. D. 561, *per* Baggallay, L.J.

[3] 1 Cr. & Ph. 283, 293, 294, 295.

[4] L. R. 4 H. L. 399, *per* Lord Hatherley; 406, 410, *per* Lord Chelmsford. It was followed in the reversed decision in the Court below: see Wakefield *v.* Buccleuch, 4 Eq. 650—653. Hilton *v.* Granville was heard on demurrer. It was tried at Bar three years afterwards. But there was no verdict and no judgment, and the action was ultimately allowed to drop. See also Paddock *v.* Forester, 3 M. & G. 903.

[5] See Smart *v.* Morton, 5 E. & B. 30; Bell *v.* Love, 10 Q. B. D. 560.

[6] See Smart *v.* Morton, *sup.*

[7] See Hilton *v.* Granville, 5 Q. B. 701. Cf. the observations of Lord Wensleydale in Rowbotham *v.* Wilson, 8 H. L. C. 363.

[8] See Hilton *v.* Granville, *sup.*

[9] 1 B. & S. 940.

[10] 5 Q. B. 701, *ante*, p. 313.

custom pleaded in *Blackett* v. *Bradley* was pointed out in *Gill* v. *Dickinson*;[1] and *Blackett* v. *Bradley* cannot be relied on as a decision, that a custom to work under a waste is bad. A custom to work under copyholds without leaving support for the surface may be bad. But it does not follow, that a custom to work under a waste is bad.[2] Indeed, independently of custom, the lord is, as has been already seen,[3] entitled, in working under the wastes, to withdraw support from the surface; provided only he leaves a sufficiency of common.

SECT. 2.—ACQUISITION OF RIGHT FOR LAND IN NON-NATURAL STATE.

(*a*) *Express Grant.*

Express grant—generally.

A right of support for land in its non-natural state may be acquired by express grant; whether voluntary,[4] or statutory. As instances of statutory acquisitions it may be mentioned, that provisions are made for the preservation of dwelling-houses under the Act 7 & 8 Vict. c. 105;[5] of houses and other buildings under the Cornwall Subm. Mines Act, 1858;[6] of piers and other structures under the Crown Lands Act, 1866;[7] and (in the case of mines excepted from a grant of lands in Ireland) of places of worship, graveyards, cemeteries, public schools, houses, and outhouses, under the Act 23 & 24 Vict. c. 154.[8]

Creation of perpetual fetter on mine owner.

A common law grant cannot do more than give the right of support. It is not possible by such a grant to create a perpetual fetter upon the mine owner working his mines; such as is created by a counter-notice under the Rail. or Wat. Cl. Act.[9] Such a grant would not bind the land in the hands of

[1] 5 Q. B. D. 159.

[2] See also Buccleuch *v.* Wakefield, L. R. 4 H. L. 406, 410 (*per* Lord Chelmsford), where it is said, that a custom applicable to the customary tenancies of a manor is no authority for the right of working mines with reference to the wastes.

[3] See *ante*, p. 302.

[4] See Bonomi *v.* Backhouse, E. B. & E. 655; Angus *v.* Dalton, 4 Q. B. D. 162, 169, 170, 197; Dalton *v.* Angus, 6 A. C. 792.

[5] Giving working powers to the Duke of Cornwall: *post*, pp. 460, 461.

[6] See *post*, p. 462.

[7] *Post*, p. 463.

[8] *Post*, pp. 463, 464, and p. 509 of the 3rd edition of this book. See also 46 & 47 Vict. c. 37, s. 5.

[9] See *post*, p. 408.

successive owners.[1] A perpetual fetter can, however, in effect be obtained, under a covenant not to work, in all cases where the successive owners have notice.[2] And such a covenant would not be a "sale" within the Stamp Act, 1891.[3]

(β) *Implied Grant.*

Implied grant —importance of doctrine.

The right may also be acquired by implied grant;[4] and no doctrine in the law of support is of greater importance, or more frequent application.

Weight on land at time of severance.

If, for instance, the weight caused by buildings, or by an artificial body of water, be upon land at the time when such land is severed from the adjoining land, there is, *primâ facie*, an implied grant of the right of support for such buildings or water.[5] What a grantor grants is such a measure of support "as is necessary for the land in its condition at the time of the grant."[6]

Weight intended to be put on land.

So, where land is severed from the adjoining land for a particular object, and such object is known to both parties at the time of the severance, there is, *primâ facie*, an implied grant of a reasonable degree of support, for the due execution of that object.[7] Therefore, where the avowed object of a severance of land from the adjoining land is the construction thereon of a building, railway, or canal, or of a roadway or tramway, or of a sewer, or gas mains and pipes, there is, *primâ facie*, an implied grant of the right of support for such building, railway,

[1] See G. N.R. Co. *v.* Inland Revenue Commissioners, 1901, 1 K. B. 427, 428; *post*, p. 408.

[2] See G. N. R. Co. *v.* Inland Revenue Commissioners, *sup.* 429, *per* Stirling, L.J.

[3] *Ib.*

[4] Bonomi *v.* Backhouse, E. B. & E. 655; Angus *v.* Dalton, 4 Q. B. D. 162, 169.

[5] See Wyrley Canal Co. *v.* Bradley, 7 East, 368, 372; Caledonian R. Co. *v.* Sprot, 2 Macq. 451; Murchie *v.* Black, 19 C. B., N. S. 205; Mid. R. Co. *v.* Checkley, 4 Eq. 27, 28; Richards *v.* Jenkins, 17 W. R. 30; Dalton *v.* Angus, 6 A. C. 792, 826: and cf. Dugdale *v.* Robertson, 3 K. & J. 695, 700; Pountney *v.* Clayton, 11 Q. B. D. 840.

[6] Cal. R. Co. *v.* Sprot, 2 Macq. 451: see also Elliot *v.* N. E. R. Co., 10 H. L. Cas. 357.

[7] See Caledonian R. Co. *v.* Sprot, 2 Macq. 451, 452; N. E. R. Co. *v.* Elliot, 1 J. & H. 153; Elliot *v.* N. E. R. Co., 10 H. L. C. 357, 362; N. E. R. Co. *v.* Crosland, 4 De G. & J. 559; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 40; Aspden *v.* Seddon, 10 Ch. 401; *ib.* 1 Ex. D. 506; Siddons *v.* Short, 2 C. P. D. 577; L. & N. W. R. Co. *v.* Evans, 1893, 1 Ch. 24, 25; Ruabon Brick, &c., Co. *v.* G. W. R. Co., *ib.* 456; Glamorganshire Canal Navigation *v.* Nixon's Co., 85 L. T. 53.

canal, roadway, tramway, sewer, mains or pipes.[1] And, whether the severance be voluntary; or effected under the provisions of an Act of Parliament,[2] not incorporating the Rail. or Wat. Cl. Act;[3] or the object be, or be not, stated in the instrument of severance;[4] is immaterial. And however the thing constructed may be used, or to whatever purposes it may be applied, is also immaterial.[5]

Possible future weight contemplated.

And, even if it be merely shown to have been within the contemplation of the parties to a purchase, that an artificial weight might, at a then future time, be placed upon the land purchased, a grant will, *primâ facie*, be implied of a reasonable degree of support for that weight. Thus, where, upon a sale of land, the purchaser covenanted, that the land, "or any buildings now or hereafter to be erected thereon," should not be used for certain specified purposes, it was held, that the vendor was liable for so working mines as to injure buildings which had been erected subsequently to the sale.[6]

No implied right for reasonable weight.

There are no other means by which a grant of the right of support for land in its non-natural state can be implied. There is no authority[7] for the proposition, which has been sometimes advocated or suggested,[8] that the owner of a surface

[1] See Caledonian R. Co. *v.* Sprot, *sup.*; Elliot *v.* N. E. R. Co., *sup.*; G. W. R. Co. *v.* Bennett, *sup.*; Siddons *v.* Short, *sup.* 572, 577; Benfieldside Local Board *v.* Consett Co., 3 Ex. D. 54; Dixon *v.* Cal. R. Cos., 5 A. C. 829; Dalton *v.* Angus, 6 *ib.* 792, 826; *Re* Dudley, 8 Q. B. D. 86; Normanton Gas Co. *v.* Pope, 48 L. T. 666, 52 L. J. Q. B. 629; Pountney *v.* Clayton, 11 Q. B. D. 830, 834, 835, 840; Glasgow *v.* Farie, 13 A. C. 671; Mid. Rail. Co. *v.* Robinson, 15 *ib.* 30; L. & N. W. R. Co. *v.* Evans, *sup.* 27; Ruabon Brick, &c., Co. *v.* G. W. R. Co., *sup.* 456; G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 157; Glamorganshire Canal Nav. *v.* Nixon's Co., *sup.*; Jary *v.* Barnsley Corporation, 1907, 2 Ch. 600. Cf. the Scotch cases of Mid., &c., Gas Light Co. *v.* Oakbank Oil Co., 18 R. 788; Aitken *v.* Rawyards Coll. Co., 22 *ib.* 201.

[2] See Siddons *v.* Short, *sup.*; Dixon *v.* Caledonian R. Cos., 5 A. C. 829. *per* Lord Selborne; Pountney *v.* Clayton, *sup.* 841, 842, *per* Bowen, L.J.; L. & N. W. R. Co. *v.* Evans, *sup.* 27, *per* Bowen, L.J.: see also Jary *v.* Barnsley Corporation, *sup.* See also *ante*, p. 302, n. [1], and cases there cited. See, however, G. W. R. Co. *v.* Bennett, *sup.* 41, 42, *per* Lord Westbury; Pountney *v.* Clayton, *sup.* 834, *per* Brett, M.R.

[3] As to which, see *post*, pp. 369 *et seq.*

[4] See Siddons *v.* Short, *sup.*

[5] Caledonian R. Co. *v.* Sprot, 2 Macq. 462; N. E. R. Co. *v.* Elliott, 2 De G. F. & J. 432.

[6] Berkeley *v.* Shafto, 15 C. B., N. S. 79.

[7] See Dalton *v.* Angus, 6 A. C. 804, 808, *per* Lord Penzance; and see 763. See also Richards *v.* Jenkins, 17 W. R. 33, *per* Channell, B.

[8] See Rogers *v.* Taylor, 2 H. & N.

ought, in every case, to have, *primâ facie*, a right of support for all reasonable buildings which may be put upon it. Refusing to accept it can hardly, it may be observed, in any case involve hardship. For, if a man's house is injured by mining operations, and he can show that his land would have been injured, even if it had been in its natural state, he will, although having no right of support for the house, be entitled to damages, not merely in respect of the land, but also in respect of the house.[1]

No implied grant except by grantor and to extent of his power.

It would be a contradiction in terms, if the doctrine of implied grant prevailed against a person who was not a grantor. If A. purchases from B. a piece of land for the purposes of a railway, and the railway requires support, not only from the land of B., but from the land of C., which laterally adjoins; A., *primâ facie*, acquires no right of support against C. So where C., instead of being a lateral owner, is a subjacent owner. In the case of subjacent support, the doctrine of implied grant is confined to the case of the person who is owner of both surface and mines at the time of the purchase of the surface. And where a surface owner is without the right of support, or only has it for the land in its natural state; and the surface is purchased for the purposes of a railway; the purchaser does not purchase by implication the right of support for the railway. For the surface owner could not give him any greater rights than he himself possessed.[2] Of course, however, if a surface owner is entitled to the right of support for all purposes, he may transfer such right to a person who purchases the surface.[3]

Implied grantor need not be grantor of land.

It may be, however, that when a statute authorises the making and maintenance of a work of public utility, there is a right of support, not merely against the person whose land is actually purchased or used, but against another

828; Richards *v.* Jenkins, 17 W. R. 32; Dalton *v.* Angus, *sup.* 749, 772: see also Brown *v.* Robins, 4 H. & N. 190, 193.

[1] See *ante*, pp. 306, 307.

[2] See Pountney *v.* Clayton, 11 Q. B. D. 840, 841, *per* Bowen, L.J.

[3] See Pountney *v.* Clayton, *sup.* 841; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 326. The law under the Rail. & Wat. Cl. Acts stands upon a peculiar footing, and is subsequently stated; *post*, pp. 369 *et seq.*

person; whether owning laterally, or vertically. Examples of statutory rights of this kind may be found in the Acts [1] mentioned in division (*a*) of section 3 of Part D. of this chapter.[2] In such a case the right of support rests upon an implied grant created by the Act itself.[3]

Loss of right by omission to repair.

A right of support for an artificial structure acquired under an implied grant may be lost by omitting to keep the subject-matter in proper repair. For example, the owners of a canal, constructed under a statutory power, may lose the right to have it supported if they neglect a statutory duty to keep it in repair.[4]

No loss by increasing weight.

Where, however, a right of support for an artificial weight is acquired under an implied grant, and the dominant owners subsequently increase the weight, although they do not acquire a new right, they do not lose the old one.[5] And it is immaterial, that they acquired the old right by statute, and that they increased the weight under an Act incorporating the Rail. Cl. Act,[6] and repealing the previous statute; the incorporating and repealing Act being expressed to be without prejudice to all rights and liabilities under the previous statute.[7]

Express contract as to other mines.

Where the owner of two adjoining tenements sells one of them, excepting the underlying mines; and stipulating, that he shall not be liable for any damage which their working may cause; his stipulation, according to a principle already stated,[8] does not exempt him from liability for damage to that tenement by lateral workings under the other tenement. And if he sells it for the erection of buildings, his stipulation may not exempt him from liability for damage to those buildings by such lateral workings; although, if it had been unburdened by

[1] See *post*, pp. 346—354.

[2] See *post*, pp. 351—354.

[3] The possibility of this was recognised in Metrop. Bd. of Wks. *v.* Metrop. R. Co., L. R. 3 C. P. 612, 4 *ib.* 192, *post*, p. 368; and in *In re* Dudley, 8 Q. B. D. 86, and Jary *v.* Barnsley Corporation, 1907, 2 Ch. 619, *post*, pp. 349, 354.

[4] See Staffordshire Canal Co. *v.* Hallen, 6 B. & C. 317. For a case where the right was alleged to be affected by vibration caused by a railway, see Green *v.* Belfast Tramways Co., 20 L. R. (Ir.) 35.

[5] G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 157.

[6] See, as to this, *post*, pp. 369, 370 *et seq.*

[7] G. W. R. Co. *v.* Cefn, &c., Co., *sup.*

[8] See *ante*, p. 310.

buildings, the workings would not have caused it to come down.[1]

Exclusion of doctrine of implied grant.

Of course, however, the application of the doctrine of implied grant may be excluded, wholly or partially, by the parties, or (in cases arising under Acts of Parliament) by the legislature. The question is in every case one of the construction of the instrument.[2]

No implied reservation.

It does not follow, that, because the right of support can be acquired by implied grant, it can, under similar conditions, be acquired by implied reservation. It can be so acquired where there is an implication of the existence of reciprocal easements; as in the case of two adjoining houses.[3] But at this point the analogy ceases. In all other cases, where two adjoining properties are held by a common owner, and he sells one of them, he must, if he wishes to reserve the right of support, do so in express terms.[4]

Highways and streets—electric lines, telegraph wires, &c.

The right of working mines under roads or highways, which are vested in urban sanitary authorities, has been already stated.[5] The right of working mines under or adjacent to roads, along or across which electric lines are laid, has also been already stated.[6] Section 59 of the Tramways Act, 1870, provides as follows:—"Nothing in this Act shall limit or interfere with the rights of any owner, lessee, or occupier of any mines or minerals lying under or adjacent to any road, along or across which any tramway shall be laid, to work such mines and minerals, nor shall any such owner, lessee, or occupier be liable to make good or pay compensation for any damage which may be occasioned to such tramway by the working in the usual and ordinary course of their mines or minerals." And Part 2 of the Pub. Health Am. Act, 1890, which provides for the prevention of danger or obstruction to the public by telegraph wires or similar apparatus, contains a similar provision.[7]

[1] See Aspden *v.* Seddon, 1 Exch. D. 506.

[2] Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 456.

[3] See Richards *v.* Rose, 9 Exch. 218.

[4] Union, &c., Co. *v.* London, &c., Co., 1902, 2 Ch. 557; affirming S. C. 1901, 2 Ch. 300.

[5] *Ante*, pp. 64, 298: see A.-G. *v.* Conduit Colliery Co., 1895, 1 Q. B. 301, cited *ante*, p. 298.

[6] *Ante*, p. 64.

[7] See s. 15 (2).

(γ) *Prescription.*

The right of support for land in its non-natural state is not necessarily acquired either by express grant,[1] or implied grant.[2] It may be acquired by enjoyment from the time of legal memory.[3] And where the right is claimed on this ground, the claim to it cannot be defeated by reason only, that actual proof is given, by scientific or other evidence, that the non-natural state must of necessity have originated at a time later than that of legal memory.[4] The fiction of a grant made and lost, in modern times, may, it seems, be applied, so as to destroy the effect which such proof might otherwise have.[5] Enjoyment since legal memory.

The right of support for land in its non-natural state may also be acquired by an adverse enjoyment for twenty years.[6] However, an enjoyment for twenty years can only confer the right, if the servient owner was capable of making a grant.[7] No such right can, for example, be obtained against a lunatic.[8] And an enjoyment for twenty years can only confer the right, if the servient owner knew, or might have known, that some alterations as to support were being made.[9] But if he had or might have had this knowledge, it is not necessary that he should also have been aware of the extent or details of the alterations.[10] And an enjoyment for twenty years cannot confer the right, if the person claiming it has practised deception or concealment. If a person, who knows that an artificial weight is being in fact imposed, makes inquiries as to its extent or details, and receives false or misleading information, no right can be acquired against him by prescription. And if the weight is imposed secretly or surreptitiously, so as to keep material facts from his knowledge, his position is the same.[11] And Adverse enjoyment for twenty years.

[1] *Ante*, pp. 315, 316.

[2] *Ante*, pp. 316 *et seq.*

[3] Angus *v.* Dalton, 4 Q. B. D. 162, 170, 171, 185, 186; Dalton *v.* Angus, 6 A. C. 762, 763, 783, 784, 810. See Bell *v.* Love, 10 Q. B. D. 559, 560.

[4] Angus *v.* Dalton, *sup.* 172, 186, 199.

[5] *Ib.* 172, *per* Thesiger, L.J.

[6] Rogers *v.* Taylor, 2 H. & N. 828; see also Richards *v.* Jenkins, 17 W. R. 31, 33; Angus *v.* Dalton, 4 Q. B. D. 162, 170, 171, 185, 186, 201; Dalton *v.* Angus, 6 A. C. 794, 801; Green *v.* Belfast Tramways Co., 20 L. R. (Ir.) 35; Greenwell *v.* Low Beechburn Co., 1897, 2 Q. B. 165.

[7] Angus *v.* Dalton, *sup.* 162, 170, 171, 185, 186.

[8] *Ib.* 174, 186; Dalton *v.* Angus, *sup.* 751, 771, 827.

[9] Dalton *v.* Angus, *sup.* 801, 828: but see 779; Union, &c., Co. *v.* London, &c., Co., 1902, 2 Ch. 557; affirming S. C. 1901, 2 Ch. 300.

[10] Dalton *v.* Angus, *sup.* 801, 802, 828.

[11] *Ib.* 820, 827, 828.

no right can be acquired unless the enjoyment has been as of right.[1]

Former doubts, whether claim could be defeated if enjoyment dissented from.

Whether, after the right has been in point of fact enjoyed for twenty years, the claim to it can be defeated by mere proof, that the enjoyment was never actually assented to, or was dissented from, is a question which was formerly not free from doubt. For it was a received doctrine, that the right of support for land in its non-natural state, is only a negative or passive easement ;[2] not susceptible of interruption by the servient owner ; and not therefore an easement obtainable by twenty years' enjoyment within the meaning of section 2 of the Prescription Act.[3] The statute, therefore, having regard to this doctrine, gave no facilities for answering the above question.[4] Moreover, although there were numerous cases containing dicta on the subject ;[5] and although such cases showed a great preponderance of opinion in favour of the proposition, that the claim could not be so defeated ;[6] the reasons urged against it were of the greatest weight.[7]

Dalton *v.* Angus.

The whole position was fully considered in *Dalton* v. *Angus*,[8] and the law applicable was laid down by the House of Lords

[1] Tone *v.* Preston, 24 Ch. D. 739.

[2] Angus *v.* Dalton, *sup.* 197, 203 ; Dalton *v.* Angus, *sup.* 776.

[3] 2 & 3 Will. 4, c. 71. "No claim, which may be lawfully made at the common law by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water to be enjoyed, &c., when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way and other matter was first enjoyed at any time prior to such period of twenty years ; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated," &c.

[4] See Angus *v.* Dalton, 3 Q. B. D. 85 ; 4 *ib.* 162, 170, 185, 197, 198 ; Dalton *v.* Angus, 6 A. C. 742, 764.

[5] See Palmer *v.* Fleshees, 1 Sid. 167 ; Stansell *v.* Jollard, 1 Selw. N. P. 11th ed. 457 ; Wyatt *v.* Harrison, 3 B. & Ad. 871 ; Partridge *v.* Scott, 3 M. & W. 220 ; Humphries *v.* Brogden, 12 Q. B. 749 ; Rowbotham *v.* Wilson, 8 E. & B. 140, 142 ; Rogers *v.* Taylor, 2 H. & N. 828 ; Brown *v.* Robins, 4 *ib.* 186, 190 ; Hunt *v.* Peake, Joh. 711 ; Bonomi *v.* Backhouse, E. B. & E. 655 ; Richards *v.* Jenkins, 17 W. R. 31, 33. See also Met. Bd. Wks. *v.* Met. R. Co., L. R. 3 C. P. 622 ; and cf. Woodall *v.* Hingley, 14 L. T., N. S. 167.

[6] Dicta in favour of the proposition are expressed more or less broadly in most of the cases cited in the preceding note, except Brown *v.* Robins, and Woodall *v.* Hingley. The latter cases contain dicta against it.

[7] See Dalton *v.* Angus, 6 A. C. 764, 775, 779, 805—807.

[8] 6 A. C. 740. This case affirmed Angus *v.* Dalton, 4 Q. B. D. 162, which reversed S. C. 3 *ib.* 85. See also Jordeson *v.* Sutton, &c., Co., 1898, 2 Ch. 624, 1899, 2 Ch. 238, 243,

to the following effect. Uninterrupted enjoyment for twenty years of the right of support for land in its non-natural state raises a presumption of a grant of the right. This presumption cannot be rebutted by mere proof by the servient owner that he had made no grant either at the commencement or during the continuance of the enjoyment; or even that he had positively dissented from the enjoyment. And there is no form of legal proceeding by which the acquisition of the right can be prevented. It can only be prevented by actual physical interruption; however difficult or inconvenient or ruinous to the person interrupting such interruption may be.[1] Indeed, although it was not necessary for the purpose, the doctrine that the right of support for land in its non-natural state is only a negative or passive easement,[2] was expressly challenged by Lords Selborne and Watson;[3] and the former laid it down that it is in fact an easement within section 2 of the Prescription Act.[4] Upon this point, however, Lord Blackburn refused to express an opinion.[5]

Support for land in natural state necessary.

The right of support for land in its non-natural state cannot, however, be acquired by prescription, if the person claiming it is disentitled to support for the land in its natural state.[6] No doubt *Bell* v. *Love*[7] contains observations to the contrary. But they were not necessary for the decision; and cannot be sustained.[8]

Unlawful or careless conduct of dominant owner.

And in order that such a right may be so acquired, the dominant owner must have acted reasonably and without negligence. If injury to a building or a body of water, which would otherwise have had a prescriptive right to support, can

[1] See Angus *v.* Dalton, 4 Q. B. D. 162, 172, 173, 176, 177, 186, 187, *per* Thesiger and Cotton, L. JJ.; Dalton *v.* Angus, 6 A. C. 796, 797, 801, 802, *per* Lord Selborne: see also pp. 753, 766, 785, 786.

[2] *Ante*, p. 322.

[3] See Dalton *v.* Angus, *sup.* 793, 798, 831, adopting the opinions of Lindley and Bowen, JJ., 763, 784.

[4] *Ib.* 798: see also G. N. R. Co. *v.* Inland Rev. Comms., 1901, 1 K. B. 428, 429. The section is cited, *ante*, p. 322, n. [2].

[5] Dalton *v.* Angus, *sup.* 815.

[6] See Rowbotham *v.* Wilson, 6 E. & B. 593, 605; 8 *ib.* 123; 8 H. L. C. 348, 365.

[7] 10 Q. B. D. 547, 570, 571, *per* Lindley, L.J.; professing to follow Dalton *v.* Angus, *sup.* 740.

[8] The main decision in Rowbotham *v.* Wilson, *sup.*, was frequently referred to in other parts of the case, and was mentioned in his lordship's own judgment. But he could not have used the observations in question, if his attention had been called to the decision upon the point stated in the text.

be attributed to the fact that it was in the first instance constructed in an unreasonable manner; or with some serious intrinsic weakness; or with some serious extrinsic weakness, as, for instance, on loose sandy soil, or soil honeycombed by mining operations; its owner cannot, *primâ facie*, recover against the adjoining owner for removing the support.[1] However, if, notwithstanding the condition of the dominant tenement, no injury would have occurred but for the acts of the servient owner, the latter will be liable.[2]

Prescription following transfer of pre-existing right.

Of course the transfer of the right of support for land in its natural state by a mere conveyance of the land, to which it belongs,[3] enables the grantee; whether an individual, or a Railway Co. or other corporation; to acquire by prescription the additional right of support for a building, bridge, or other artificial structure put upon it.[4]

PART D.—CONSTRUCTION.

SECT. 1.—GENERALLY.

Generally.

The cases which have come before the Courts, involving the right of support, and raising questions of construction, and incidental questions, are numerous. It will be remembered, that the owner of land in its natural state is entitled, *primâ facie*, to support as "an incident to the land itself."[5] And in the great majority of cases involving the right of support for land in its non-natural state, and raising questions of construction, the owner would, independently of such questions, have been entitled to support under the doctrine of implied grant.[6] Similar considerations, therefore, usually apply, in cases raising questions of construction, whether the land is in its natural or its non-natural state; and, in dealing with the cases raising questions of construction and incidental questions, it will be convenient to do so without reference to the distinction

[1] See Partridge *v.* Scott, 3 M. & W. 229; Woodall *v.* Hingley, 14 L. T., N. S. 167; Angus *v.* Dalton, 4 Q. B. D. 175, 181; Dalton *v.* Angus, 6 A. C. 755, 760, 787, 828.

[2] Richards *v.* Jenkins, 17 W. R. 32, 33.

[3] See *ante*, pp. 302, 303.

[4] See Manchester Corporation *v.* New Moss Colliery Co., 1906, 2 Ch. 278; see the facts stated, *post*, pp. 397, 398.

[5] *Ante*, p. 289.

[6] *Ante*, pp. 315 *et seq.*

between land in its natural state and land in its non-natural state.

Before stating how the instruments and enactments raising the above questions may be classified, and considering the rights and obligations of the parties arising under each class, it will be convenient to refer to a preliminary question which sometimes arises in the case of railway or waterworks companies —namely, the question under which instrument a particular case falls. This is, or frequently is, itself a question of construction.

Sometimes preliminary question in case of railway or waterworks companies.

In *Cal. R. Co.* v. *Sprot*,[1] and *N. E. R. Co.* v. *Crossland*,[2] it was held that a right already acquired by a railway company or its predecessor in title was not taken away by a subsequent Act giving an option of purchasing minerals, the working of which would be likely to injure the railway.

Cal. R. Co. *v.* Sprot— N. E. R. Co. *v.* Crossland.

In *Swindells* v. *Birmingham Canal Navigation* [3] it was held, that a right acquired by a canal company under an early Act to prevent mine owners from working within twenty yards of "any tunnel" was not taken away by a subsequent Act which (1) repealed the earlier Act, (2) provided that the repeal should not affect purchases, and (3) entitled the company to prevent mine owners from working within twelve yards from their "canals, towing paths, reservoirs, or other works;" and that the right of the mine owners to compensation was in like manner determinable by the earlier, and not by the later Act.

Swindells *v.* Birmingham Canal Navigation.

In *Ruabon, &c., Co.* v. *G. W. R. Co.*[4] it was held, partly upon the history of the transaction, and partly upon the construction of the documents,[5] that the position depended, not upon the ordinary principles of real property law, but upon the code under the Rail. Cl. Act.

Ruabon, &c. *v.* G. W. R. Co.

In *L. & N. W. R. Co.* v. *Walker*,[6] a railway company were empowered to make a railway and acquire land under Acts passed in 1833 and 1835. The Acts provided that on purchases minerals were to be deemed to be

L. & N. W. R. Co. *v.* Walker.

[1] 2 Macq. 449.

[2] 2 J. & H. 565, 4 De G. F. & J. 550.

[3] Before the Court of Queen's Bench, 23 Feb., 1858. The case is not reported. It was a cross-action consequent upon Birmingham Canal Co. *v.* Swindell, 7 H. & N. 980, n.; referred to *post*, p. 356.

[4] 1893, 1 Ch. at 452.

[5] See the facts stated, *post*, pp. 469, 470.

[6] 1903, A. C. 289.

excepted; and they defined the mining rights in terms more advantageous to the company than those to which railway companies are entitled under the Rail. Cl. Act. Land was purchased accordingly; the conveyance being expressed to be in accordance with the Acts of 1833 and 1835. An Act passed in 1846 repealed the prior Acts, with a proviso that the repeal should not affect any purchase thereunder. It then incorporated the Lands Cl. and Rail. Cl. Acts, with a proviso that the Rail. Cl. Act was to be read so far as it was not inconsistent with the Act of 1846, and as if the railway had been made under the Rail. Cl. Act. It was held that the mining rights were regulated by the repealed Acts, and not by the Lands Cl. and Rail. Cl. Acts.[1]

New Moss Colliery *v.* Manchester Corporation.

In *New Moss Colliery* v. *Manchester Corporation*,[2] the facts of which are subsequently stated,[3] the question arose whether a waterworks authority, with a power to purchase under a special Act, but to purchase by agreement only, were subject to the "code" applicable under the Wat. Cl. Act.

Classification of cases of construction.

Subject to considering, when it arises, the preliminary question above referred to, the instruments and enactments raising questions of construction, and incidental questions, may be grouped under three main classes:—(1) Instruments *inter partes*, and (what are in substance the same) Inclosure Acts. (2) Special Railway and Canal and similar Acts.[4] And (3) the Rail. Cl. Cons. Act, 1845, and similar Acts.[5] The first of these three classes relates as well to land in its natural state, as to land in its non-natural state. The second and third, of course, relate exclusively to land in its non-natural state.

Sect. 2.—Instruments inter partes and Inclosure Acts.

Classification of cases arising under instruments *inter partes* and Inclosure Acts.

The cases arising under instruments *inter partes* and Inclosure Acts may themselves be conveniently sub-classed by considering first those in which the question of construction has arisen without reference to any evidence, except that appearing from the instrument of severance itself; and secondly, those in

[1] Overruling the decision of the Court of Appeal in R. *v.* L. & N. W. R. Co., 1899, 1 Q. B. 921, *per* Smith and Romer, L.JJ.; Collins, M.R., dissenting.

[2] 1908, A. C. 117.

[3] *Post*, pp. 397, 398.

[4] See *post*, pp. 346 *et seq.*

[5] See *post*, pp. 369 *et seq.*

which evidence has been given of the contemporaneous circumstances, and the object which the parties had in view appearing from these circumstances.

(a) *No Evidence as to Circumstances or Object.*

(a) *Generally.*

Considerations founded upon conjecture.

It is clear that a right of support, which would otherwise exist, will not be excluded by considerations founded upon mere conjecture.[1] If the intention is left in doubt, the *primâ facie* position remains unaltered.[2]

Reservation of royalty.

It has, for example, been already seen, that the usual reservation of a royalty; although pointing at the removal of the demised minerals on a large scale; is not, of itself, sufficient to vary the *primâ facie* position of the parties.[3]

Reservation in Inclosure Act of right of holding, &c.

So the clause commonly inserted in an Inclosure Act, under which the mines are reserved to the lord, that they shall be held and enjoyed "in as full, ample, and beneficial a manner to all intents and purposes" as he could have done in case the Act had not been made, is not, it has been held, of itself, sufficient to vary the *primâ facie* position. A right of holding and enjoying mines is merely incidental to their ownership. And it is immaterial, it has been held, that, before the Act, the lord might have worked without regard to the support, provided he left a sufficiency of common.[4] It has been held, that by the Act the rights of the commoners become freehold rights; and the clause in question must therefore be read with reference to such freehold rights, and so as not to prejudice them.[5] This is a highly artificial construction. Lord Macnaghten, although himself applying it in the *Butterknowle* case, described it as having "led this House to treat the provision in which it is found, and of which it would seem at first sight to be the key

[1] See Proud *v.* Bates, 34 L. J. Ch. 412; Aspden *v.* Seddon, 10 Ch. 396, n. 399, n.; Davis *v.* Treharne, 6 A. C. 469; Love *v.* Bell, 9 *ib.* 299.

[2] See Mundy *v.* Rutland, 23 Ch. D. 81; Dixon *v.* White, 8 A. C. 833; Love *v.* Bell, 9 *ib.* 286.

[3] *Ante*, p. 300.

[4] See *ante*, p. 302.

[5] See Bell *v.* Love, 10 Q. B. D. 547, 565—570; Love *v.* Bell, 9 A. C. 291, 292, 293, 297, 300; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425, 437, 442; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 310, 313, 314, 316, 320; Butterley Co. *v.* New Hucknall Co., 1910, A. C. 383—384. Cf. Price *v.* Plaskynaston, &c., Co., 2 T. L. R. 90.

note, as a dead letter for any practical purpose." [1] But it is clear from Lord Halsbury's observations in the *Butterley* case, that, in his opinion, if "misled" had been substituted for "led," the description would have been more accurate.[2]

Clause giving working liberties.

The clause commonly inserted in an instrument of severance giving full liberties of working is not, of itself, sufficient to vary the *primâ facie* position.[3] Such a clause only gives to the mine owner in express words what, in its absence, he would have by implication.[4] And it is immaterial however largely the clause may be expressed.[5] "Words, however wide, that merely authorise the getting of all the minerals, have been held not to authorise so getting them as to let down the surface." [6] "To exclude the presumption it is not enough, that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint." [7] It does not seem to be material whether the working liberties are merely reserved or are newly created by grant.[8]

Compensation clause sometimes immaterial.

The presence of a compensation clause is sometimes or to some extent immaterial. The mere fact, that damage is to be compensated by a money payment, cannot give the mine owner

[1] See 1906, A. C. at pp. 314, 315.

[2] See 1910, A. C. 383, *per* Lord Halsbury. It may be suspected, that it was also his opinion, that it would have been more accurate, if the words "at first sight" had been omitted.

[3] See Harris *v.* Ryding, 5 M. & W. 60; Smart *v.* Morton, 5 E. & B. 30; Roberts *v.* Haines, 6 *ib.* 643; Haines *v.* Roberts, 7 *ib.* 625; Cal. R. Co. *v.* Sprot, 2 Macq. 449; Proud *v.* Bates, 34 L. J. Ch. 406, 412; Bell *v.* Wilson, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 714; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 290; Aspden *v.* Seddon, 10 Ch. 402; Bell *v.* Love, *sup.* 562, 563, 570; Love *v.* Bell, *sup.* 289, 291, 299, 300; Westmorland *v.* New Sharlston Co., 79 L. T. 721, 80 L. T. 846; New Sharlston Co. *v.* Westmorland, 82 L. T. 726; S. C. 1904, 2 Ch. 443, n.; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 435; Jary *v.* Barnsley Corporation, 1907, 2 Ch. 600. Cf. Dugdale *v.* Robertson, 3 K. & J. 695; Davis *v.* Treharne, 6 A. C. 460. See, however, Rowbotham *v.* Wilson, 8 H. L. Cas. 363, 364.

[4] See *ante*, p. 288.

[5] Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425, 441.

[6] Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 309, *per* Lord Loreburn.

[7] *Ib.* 313, *per* Lord Macnaghten. See also Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 54.

[8] In Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. at p. 425, 426, Farwell, J., said that the difference was important; but a contrary opinion was expressed by Vaughan Williams and Romer, L.JJ., at pp. 432, 437; and it does not seem to have been considered as of importance in the House of Lords: see 1906, A. C. 305.

a right to do what damage he pleases.[1] On the other hand, a mine owner, who has otherwise a right to do what damage he pleases, cannot have that right taken away by a compensation clause.[2]

Compensation clause —when presence or absence material.

However, in cases otherwise doubtful, the presence or absence of a compensation clause, and the scope of it when present, are important factors in determining whether the right of support is, or is not, intended to be excluded.[3]

Lord Blackburn in Davis *v.* Treharne.

In *Davis* v. *Treharne*, Lord Blackburn said : " Where parties have agreed in this way :—You shall make compensation for whatever injury you do in respect of these rights ; and, amongst other things, you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that, that the lessor says, You may let down the surface. I do not say, that it is conclusive ; but it is a very strong argument." But no similar argument is afforded by a clause merely saying, " You shall make compensation for damage done to the surface."[4]

Lord Davey in New Sharlston Co. *v.* Westmorland.

In *New Sharlston Co.* v. *Westmorland*, Lord Davey said : " I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface ; even though that covenant extends beyond the surface ; and is applicable also, or even exclusively, to underground operations. . . . It does not seem to me to give a licence to do the injury, if you say that a person shall pay compensation if he does it. A covenant to pay compensation for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it. . . . Therefore I do not accede to the argument, that the existence of a covenant for payment of compensation for letting down the surface is, whether it applies wholly or partially to underground operations or not, in any way inconsistent with the continuance of the common law obligation." [5] Some of

[1] See Dixon *v.* White, 8 A. C. 839, n., *per* the Lord President.

[2] See Consett, &c., Co. *v.* Ritson, 64 L. J. Ch. 293, n. ; which must now, however, be treated as overruled ; see *post*, p. 337.

[3] See Hext *v.* Gill, 7 Ch. 717 ; Aspden *v.* Seddon, 10 Ch. 396, n., 397, n. ; Bell *v.* Love, 10 Q. B. D. 569 ; Love *v.* Bell, 9 A. C. 296, 298, 299 ; Bell *v.* Dudley, 1895, 1 Ch. 186 ; Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425, 437 ; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 308, 309, 314.

[4] 6 A. C. 467, 468.

[5] See 82 L. T. 726, 1904, 2 Ch. 447, n.

these observations may be wider than Lord Davey intended. In *Butterknowle, &c., Co.* v. *Bishop Auckland, &c.*,[1] he stated, that he did not intend to say more than Lord Blackburn said in *Davis* v. *Treharne*.[2] And, although he subsequently referred in express terms to the second, and the second only, of the two propositions in Lord Blackburn's statement, it may perhaps be inferred that he did not intend to disagree with either of them. Whether he in fact did so is of course a question of importance.

Lords Loreburn, Macnaghten, and Davey in Butterknowle, &c., Co. *v.* Bishop Auckland, &c.

In *Butterknowle, &c., Co.* v. *Bishop Auckland, &c.*, Lords Loreburn, Macnaghten, and Davey said: "Where power is given to get the minerals on paying compensation for damage done to the surface, the Court will still scrutinise the compensation clause. Are there any rights belonging to the mine owner on the surface (such as a right of making roads) to which the compensation clause may refer? If the compensation clause is capable of being satisfied by reference to acts done *on* the surface, then, though it may be wide enough to cover also damage done *to* the surface by taking away the support, still it must be confined to damage done *on* the surface, and the inference that support may be taken away on payment of compensation will not be drawn. Again, Courts have asked, whether the compensation is manifestly inadequate for such an injury as letting down the surface, and have commented upon the absence of any provision for compensation. Either of these circumstances has supplied Judges with a reason for so cutting down wide language in a grant of minerals as to imply a condition that the surface shall be supported. The process of reasoning in such cases seems to be that parties must not be supposed to have intended what would be unreasonable and unjust."[3] "To exclude the presumption it is not enough . . . that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges. . . . Although provision for compensation is not of itself sufficient to show that the mine owner working in the usual and proper manner

[1] See 1906, A. C. 315, 316.
[2] See *ante*, p. 329.
[3] See 1906, A. C. 309, 310, *per* Lord Loreburn. See also Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 54.

is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched. On the other hand, the presence of a provision for compensation, which is obviously inadequate, or plainly inappropriate, if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated." [1] "If there is no provision for giving compensation for the injury done to the surface, it is almost conclusive that the common law rule was intended to apply." [2]

Immaterial that quarry workings also authorised.

And the mere fact, that the instrument in question authorises the working of quarries as well as mines, does not show that the compensation clause was intended to include compensation for damage caused by working the mines without leaving support. No doubt quarry workings ruin the surface. But they do not usually extend over a great space.[3]

Limited effect of reference to mining damage.

Indeed, it seems possible to say that the provision of compensation for damage caused by mining does not of necessity refer to subsidence. No doubt subsidence is the most obvious kind of damage caused by mining. But mining may also cause damage to springs, wells and streams.[4]

Covenants to work.

And even when the provisions as to working are, as in the case of a covenant in a lease, not by way of privilege to the grantee, but by way of positive obligation upon him, the *primâ facie* position may be the same. For example, the facts that the lessee has covenanted to work "in the usual and most approved way" in which other works of the like kind are performed in the district in question, and has complied with his covenant, has been held not to relieve him from liability for withdrawing support, if on other grounds he would have been liable.[5] And it may be immaterial, that the common mode of working in such district is to work up to the barrier, and then, in coming back, to cut away the pillars which are left.[6] Such a covenant may merely refer to the manner of working for mining purposes,[7]

[1] 1906, A. C. 313, 314, *per* Lord Macnaghten.

[2] *Ib.* 315, *per* Lord Davey.

[3] Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 305: see p. 312.

[4] See Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 440, *per* Vaughan Williams, L.J.

[5] See Buchanan *v.* Andrew, L. R. 2 Sc. & D. 292; Davis *v.* Treharne, 6 A. C. 464.

[6] See Shafto *v.* Johnson, 8 B. & S. 256, n.

[7] Davis *v.* Treharne, *sup.* 464.

and consistently with the other legal rights of the parties.[1] And there is high authority for saying that it is for this purpose immaterial, whether the covenant relates to the mode of the working or to its extent. It is not "enough, in the case of a lease, that the lessee is bound to work *out* the minerals." [2] As already mentioned, however, this dictum is, it is submitted, unsustainable.[3]

Nothing short of necessary implication sufficient.

In fact, unless a right of support, which would otherwise exist, is excluded by express words, it will not be excluded by anything short of necessary implication.[4] "The law presumes . . . a right of support, unless the language of the instrument . . . or other evidence clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words, or by necessary implication.[5] The right continues if the language of the instrument admits of an interpretation which preserves" it.[6]

Rule of construction laid down in House of Lords.

The difficulty in each case is to ascertain whether or not the necessary implication exists; and for this purpose the following rule of construction has been laid down in the House of Lords:—"The same presumption in favour of a right of support, which regulates the rights of parties in the absence of an instrument defining them, will apply also in construing the instrument, when it is produced. If the introduction of a clause to the effect, that the mines must be worked so as not to let down the surface, would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down. . . . I think that in each of them" (*i.e.* in cases where the Courts had previously decided in favour of the surface owner) "a clause providing for a continuance of support would not have been inconsistent with the actual clauses." [7]

[1] Shafto *v.* Johnson, *sup.* See also Buchanan *v.* Andrew, *sup.*; Love *v.* Bell, 9 A. C. 289; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 313: see also Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 46, 48, 51. The dicta to the contrary in Eadon *v.* Jeffcock, L. R. 7 Exch. 389, cannot be sustained.

[2] Butterknowle, &c., Co. *v.* Bishop Auckland, &c., *sup.*, *per* Lord Macnaghten.

[3] *Ante*, p. 258.

[4] Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 424, 436, 441; Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 309, 313, 317.

[5] Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 309, *per* Lord Loreburn.

[6] *Ib.* 311, *per* Lord Loreburn.

[7] Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 309, 310,

Vesting in grantee of grantor's own rights.

On the other hand, where in a private grant powers of getting are given in "as full, large, ample and beneficial a manner" as the grantors "could or might have done in case these presents had not been made," [1] the grantees are entitled to withdraw support.[2] There is no need in a private grant to apply the artificial rule applied to similar words in Inclosure Acts.[3]

Right otherwise excluded not preserved by conjecture.

An instrument, which would otherwise be construed as excluding the right of support, will not be construed as preserving it on the mere ground that it requires the minerals to be "properly worked." [4]

Relevant time in "working according to custom."

The relevant time in a provision obliging the mine owner, as a term of avoiding liability, to work "according to the course and practice of mining" in the district, is, *primâ facie*, the date of the instrument of severance, and not the date of the acts complained of.[5]

Effect of acts of parties.

The mere fact, that the parties to an instrument have themselves interpreted it in a sense different from that which it really bears, will not affect their rights and duties.[6]

(β) *Express Provision as to Compensation.*

Harris *v.* Ryding.

In *Harris* v. *Ryding* [7] a grant was made of land; excepting the mines, with free liberty to come into and upon the premises to dig them, and every part thereof; "making a fair compensation for the damage to be done to the surface of the premises and the pasture and crops growing thereon." It was held that the grantor was not entitled to take all the mines, but only so much as he could, leaving a reasonable support for the surface.[8]

per Lord Loreburn. Cf. also Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 48, 49, 51. Cf. Davis *v.* Treharne, 6 A. C. at p. 470, *per* Lord Watson.

[1] As in Chamber Colliery Co. *v.* Twyerould, *post*, p. 339.

[2] See New Sharlston Co. *v.* Westmorland, 1904, 2 Ch. at 446, n., *per* Lord Halsbury.

[3] See *ante*, pp. 327, 328: see, however, Mundy *v.* Rutland, 23 Ch. D. 81, the facts of which are stated, *post*, pp. 334, 335.

[4] Buchanan *v.* Andrew, L. R. 2 Sc. & D. 292.

[5] Cf. Harris *v.* Ryding, 5 M. & W. at p. 69; Smart *v.* Morton, 5 E. & B. at p. 48.

[6] Greenwell *v.* Low Beechburn Co., 1897, 2 Q. B. 165, at p. 168. See also Clifton *v.* Walmesley, 5 T. R. 564; N. E. R. Co. *v.* Hastings, 1900, A. C. 260.

[7] 5 M. & W. 60.

[8] There were houses on the land at the time of the subsidence. The defendants did not, however, state that, in removing their coal, they left sufficient support for the surface in its natural state: they claimed an absolute

The Court considered, that the compensation clause applied, or might be deemed to apply, to damage resulting from acts done on the surface under the reserved liberty; and that, even if this were not so, and the clause applied to injuries from operations below, it merely made the remedy cumulative.[1]

Smart *v.* Morton.

In *Smart* v. *Morton*,[2] a similar construction was adopted; although compensation was there provided for damage "by reason of digging, working, sinking, breaking of ground, and wayleave or other matter or thing used or exercised in working or leading of coals."

Allaway *v.* Wagstaff.

Consistently with these decisions, "surface damage" was, in *Allaway* v. *Wagstaff*,[3] defined to mean "damage to the crops by using the surface, or by the smoke coming from the colliery works or pit heaps."[4]

Davis *v.* Treharne.

And a similar construction was approved of in *Davis* v. *Treharne*;[5] although it was there assumed[6] that the lessee was at liberty to do and execute all necessary or convenient acts, works, and things, upon, in, "or under," or above the premises, making compensation for all damage occasioned by the exercise of the liberties.

Mundy *v.* Rutland.

In *Mundy* v. *Rutland*[7] a lease was made of an upper seam of coal; reserving to the lessor the right of working the other coal; and the same powers and privileges with respect thereto as if the lease had not been made; provided, that in exercising

right to remove the support. See, as to this, the judgment of Parke, B., p. 71; and see *ante*, pp. 306, 307.

[1] See also Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 *ib.* 625; Berkeley *v.* Shafto, 15 C. B., N. S. 79, 92; Williams *v.* Bagnall, 15 W. R. 274, 275; Smith *v.* Darby, L. R. 7 Q. B. 726; Chapman *v.* Day, 47 L. T. 707, 708; Mayhew *v.* Bromilow, 2 T. L. R. 400; Marquiss *v.* Pease, 4 *ib.* 696; Greenwell *v.* Low Beechburn Co., 1897, 2 Q. B. 165; Westmorland *v.* New Sharlston Co., 79 L. T. 721, 80 L. T. 846; New Sharlston Co. *v.* Westmorland, 82 L. T. 725, 1904, 2 Ch. 443, n. Cf. N. E. R. Co. *v.* Crossland, 2 J. & H. 578.

[2] 5 E. & B. 30.

[3] 4 H. & N. 681.

[4] See p. 688, *per* Watson, B. Cf. the meaning put upon the words "breaking the surface" in Dixon *v.* White, 8 A. C. 850, *per* Lord Watson. Cf. also Neall's Trustee *v.* Dixon, 7 R. 741.

[5] 6 A. C. 460. See also Greenwell *v.* Low Beechburn Co., 1897, 2 Q. B. 165.

[6] Merely *argumenti causâ*. The reserved liberties in the lease of the surface were more extensive than the granted liberties in the previous lease of the mines, and the former liberties could not of course confer any rights upon the mineral lessee which he had not under the latter. Cf. on this point, Eadon *v.* Jeffcock, L. R. 7 Exch. 379; Dixon *v.* White, 8 A. C. 846, 847, 849.

[7] 23 Ch. D. 81.

such powers and privileges the working of the upper seam should not be prevented or "unnecessarily interfered with," and that compensation should be made to the lessee for any "necessary interference" with the workings. It was held,[1] that the proviso was unintelligible; and that, if the lessor wished to reserve the right of withdrawing support from the upper seam, he should have done so in plain terms. Having regard to the words "as if the lease had not been made," the correctness of this decision is doubtful. It is not easy to see, why, if the proviso was unintelligible, the principle suggested by Lord Halsbury in the *New Sharlston* case [2] should not apply. Moreover, the existence of a proviso in very similar language was not in the *Butterley* case considered to create any obligation as regards subsidence.[3]

In *Dixon* v. *White*,[4] there was a feu disposition of coal, with power to work and sink pits. It was, however, provided, that pits should not be sunk, or the surface broken, north of a certain line; but the grantee was to be at liberty to work the coal north of such line, provided he did so from pits sunk on the south of it. It was also provided, that the grantee should pay and indemnify the surface owner "for the whole damage and injury" caused by the foresaid "operations and roads and quarries." It was held, that the provision for compensation referred, or might have referred, to compensation for damage to the surface south of the line,[5] or to compensation for damage done by accident or negligence;[6] and that there was nothing to take away the common law right of support. It was intimated[7] in the same case that "breaking" the surface did not mean simply digging into it from above, but included every process by which the surface strata were disintegrated or disturbed, whether temporarily or permanently. Dixon *v.* White.

In *Love* v. *Bell*,[8] an Inclosure Act reserved the mines to the lords of the manor "in as full, ample, and beneficial a manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made;" Love *v.* Bell.

[1] By the Court of Appeal. Kay, J., thought, that the lease partially excluded the right of support.

[2] See *ante*, p. 333.

[3] See the facts stated, *post*, pp. 344, 345.

[4] 88 A. C. 833.

[5] See p. 849, *per* Lord Watson.

[6] See p. 846, *per* Lord Blackburn; 851, *per* Lord Watson.

[7] See p. 850, *per* Lord Watson.

[8] 9 A. C. 286.

provided, that, if they worked, they should make satisfaction "for the damages and spoil of the ground" occasioned to the persons at the time in possession, such satisfaction not to exceed 5*l.* yearly "during the time" of such working for every acre damaged or spoiled. It was held, that there was nothing to exclude the right of support. The compensation clause was intended to apply to temporary damage during the working, from which the occupier alone suffered; the occupier being alone entitled to receive the compensation, and a period being limited for the duration of its payment. And even if it could have been held to apply to other kinds of permanent damage, such as those arising from sinking shafts and depositing spoil,[1] it would not follow, that it should apply to the permanent damage arising from subsidence, which might not take place until long after the working had ceased.[2]

Butterknowle, &c., Co. *v.* Bishop Auckland, &c.

Butterknowle, &c., Co. v. *Bishop Auckland, &c.*,[3] was a somewhat similar case. There an Inclosure Act provided, that the lord of the manor might have and enjoy all mines and quarries (except certain stone quarries), with liberty of searching for, winning, and working the same, and carrying away the minerals, and making drifts, levels, and watercourses "as fully and freely as he . . . might or could have had or enjoyed the same in case this Act had not been made, and that without making or paying any satisfaction." The Act then, after reciting that "great inconvenience may happen and damage be done" by working under the allotments without making satisfaction, provided, that, in case any allotment was injured by the exercise of the reserved powers, the damage should be borne rateably by the occupiers of the other allotments in the same township, and should be enforceable by distress upon their goods. It was held, that there was nothing to exclude the right of support. As the result of a contrary decision, occupiers

[1] See, as to this, *post*, pp. 451, 452.

[2] Affirming Bell *v.* Love, 10 Q. B. D. 547. See also Hayles *v.* Pease and Partners, 1899, 1 Ch. 567; *post*, p. 460. And, as to the last proposition, see Love *v.* Bell, *sup.* 301, 302, *per* Lord Bramwell; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 322, &c.; Bell *v.* Dudley, 1895, 1 Ch. 186, &c. See also Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 *ib.* 625 (but see p. 627, *per* Martin, B.); Richards *v.* Jenkins, 17 W. R. 30. Cf. Hodgson *v.* Moulson, 18 C. B., N. S. 332. Cf. also Proud *v.* Bates, 34 L. J. Ch. 412.

[3] 1906, A. C. 305: affirming Bishop Auckland, &c. *v.* Butterknowle, &c. Co., 1904, 2 Ch. 419.

with a temporary tenancy would have been obliged to pay for a permanent injury; on pain, if they failed to do so, of having their goods seized under a distress.[1] The decision and dicta [2] in this case have far-reaching effects. It overruled *Gill* v. *Dickinson*; [3] which had itself overruled *Blackett* v. *Bradley*; [4] both of which were decisions under the same Act. It also overruled *Consett Waterworks Co.* v. *Ritson*,[5] and must be taken to have overruled *Thompson* v. *Mein*,[6] and *Bell* v. *Dudley*; [7] all of which were decisions under Acts which were very similar and none of which satisfied Lord Loreburn's rule of construction.[8]

Sitwell *v.* Londesborough—settlement.

In *Sitwell* v. *Londesborough* [9] an owner in fee settled land to uses under which he became tenant for life. He excepted the mines, with power to work them; making reasonable compensation to the trustees of the settlement for all damage caused to the inheritance, and to the persons entitled to the surface for all damage caused to things upon such surface. It was held, that there was no power to let down the surface.

Smith *v.* Darby.

A different construction was adopted in *Smith* v. *Darby*.[10] There a lease was made of mines, with full power to work; making reasonable compensation for damage done by the surface being covered with rubbish, or for damage done to the lands in sinking and getting the minerals, "or for injury done in dwelling-houses" on the lands "by getting minerals, &c., under or near the same," according to the covenant thereinafter contained. Then followed a covenant, providing, that, in case damage should be caused to the dwelling-houses by the mining operations, the lessees should rebuild or repair them; and that they should compensate the lessor and his tenants for damage done to the crops and land. It was held, that the right of support was excluded. The compensation clause could

[1] See 1906, A. C. 312.
[2] See *ante*, pp. 327, 228, 330—332.
[3] 5 Q. B. D. 159.
[4] 31 L. J. Q. B. 65.
[5] 64 L. J. Ch. 293, n.; reversing S. C. 22 Q. B. D. 318. See Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, A. C. 314, *per* Lord Macnaghten.
[6] W. N. 1893, p. 202.
[7] 1895, 1 Ch. 182. It will be observed, however, that Lord Atkinson preferred to distinguish, rather than overrule, Gill *v.* Dickinson, Consett Waterworks Co. *v.* Ritson, and Bell *v.* Dudley, 1906, A. C. 321—323.
[8] *Ante*, p. 332.
[9] 1905, 1 Ch. 460.
[10] L. R. 7 Q. B. 716.

not,[1] as in *Harris* v. *Ryding*,[2] be read as confined to acts done on the surface. Injury was contemplated to the dwelling-houses; and this could only proceed from mining operations below.[3]

Aspden *v.* Seddon.

So in *Aspden* v. *Seddon*.[4] There a grant was made of land; excepting the mines, with liberty to work, "but without entering on the surface;" the grantor making compensation for all damage done by the exercise of the excepted liberties to the erections to be made on the land. The consideration for the conveyance partly consisted of a covenant by the grantee to erect and keep in repair a cotton mill on the land. The grantee erected the cotton mill. The mine owner worked by means of a pit outside the boundary of the surface owner; and, in consequence of the working, the land subsided, and the mill was injured. It was held, that, notwithstanding the covenant,[5] the mine owner could not be restrained from working, so as to let down the surface. The mine owner was precluded from entering upon the surface; and the compensation which he was to pay could only therefore refer to underground workings.[6]

Buccleuch *v.* Wakefield.

In *Buccleuch* v. *Wakefield*,[7] an Inclosure Act reserved the mines to the lord of the manor, with specially enumerated powers, including a power to destroy the surface for an indefinite period by the deposit of refuse, the erection of buildings, and the formation of channels. These powers were to be exercised in as full and ample a manner as if the lands had remained open or uninclosed, or the Act had not been passed; the lord making reasonable compensation for damage done by his mining operations to the persons sustaining such damage. The mines were valuable; and previously to the Act the lord

[1] See the judgment of Lush, J., at p. 727.

[2] 5 M. & W. 60; *ante*, p. 333.

[3] Cf. Williams *v.* Bagnall, 15 W. R. 275, *post*, p. 342.

[4] 10 Ch. 394.

[5] Cf., upon this point, Buchanan *v.* Andrew, L. R. 2 Sc. & D. 286, *post*, p. 343.

[6] See Dixon *v.* White, 8 A. C. 851; Love *v.* Bell, 9 *ib.* 299. See also Bishop Auckland, &c. *v.* Butterknowle, &c., Co., 1904, 2 Ch. 425. Cf. Davis *v.* Treharne, 6 *ib.* 468. See also Barr *v.* Baird, 6 F. 524, where the liability to compensate was held to be confined to buildings existing at the time when the titles were severed. The bill in Aspden *v.* Seddon was dismissed, without prejudice to the right to bring an action for damages. An action was accordingly brought, which resulted in favour of the surface owner: see Aspden *v.* Seddon, 1 Exch. D. 496.

[7] L. R. 4 H. L. 377.

had worked them, paying compensation for the damage which he did. The powers were far more extensive than any which the lord would have had if the Act had not passed. It was held by the House of Lords, that the intention of the legislature was, that the completest power should be given of working the mines; and therefore, that the lord was entitled to work to an extent which might reach to the utter destruction of the land above, subject only to the liability to pay compensation for damage done.[1] This case has been frequently the subject of observation.[2] It does not satisfy the rule laid down by Lord Loreburn in *Butterknowle, &c., Co.* v. *Bishop Auckland, &c.*;[3] and the latter case would no doubt have overruled it, if it had been possible to do so. It now stands apart,[4] and is only an authority upon the particular Act under which it was decided.

Chamber Coll. Co. *v.* Twyerould.

In *Chamber Colliery Co.* v. *Twyerould*,[5] mines were conveyed under certain lands "save and except the mines . . . lying and being under any buildings . . . standing upon or being parcel of the" lands. Powers of "getting" the minerals were given "in as full, large, ample, and beneficial a manner to all intents and purposes as" the grantors "could or might have done in case these presents had not been made." Other powers were then given to the grantees, they "doing as little damage and injury to the same . . . lands and grounds and the surface, soil, and herbage thereof as the nature of the case would admit of, and making satisfaction . . . for all unavoidable trespass, damage, and spoil of ground to be done or occasioned" by the exercise of the powers aforesaid in the mode therein mentioned. And then followed a covenant by the grantees, "that in case any injury or damage shall accrue, or be done, or occasioned to any building erected or standing upon" the lands by the working of the mines or the exercise

[1] Reversing Wakefield *v.* Buccleuch, 4 Eq. 613.

[2] See *per* Mellish, L.J., in Hext *v.* Gill, 7 Ch. 716, 717; and Lords Selborne and Watson in Love *v.* Bell, 9 A. C. 295, 296, 298.

[3] *Ante*, p. 332.

[4] See Butterknowle, &c., Co. *v.* Bishop Auckland, &c., 1906, 314, 316, *per* Lords Macnaghten and Davey.

[5] There is a note of this case when it was before the Court of Appeal (Twyerould *v.* Chamber Coll. Co.) in W. N. 1892, p. 27. The case was taken to the House of Lords, but is not reported. The statement in the text is principally taken from a transcript of the proceedings.

of the liberties thereby granted, then they, "their heirs, appointees, or assigns, should and would forthwith make full satisfaction and compensation for such injury and damage . . . over and above and independently of the sums of money thereinbefore provided . . . for trespass and damage as before specified." Subsequently to the conveyance, but more than thirty years before the commencement of the action, buildings were erected on the lands in question; and these buildings were injured by the grantees' workings. It was held, that the grantees were entitled to remove the support, subject only to the liability to make compensation in respect of all buildings on the surface at the time of the subsidence.[1]

Brewer *v.* Rhymney Iron Co.

Where coal lessees had liberty to work, "doing no wilful or avoidable and unnecessary damage to the other veins . . . or the surface of the land, or the buildings thereon, and making reasonable compensation for all damage occasioned thereby;" and they covenanted to work "continuously . . . and so that all the marketable coal . . . capable of being got . . . shall . . . be worked before the seam is given up as exhausted; and not in the execution of the works to "injure or endanger" existing or future buildings; and not "to commit . . . any damage in, upon, or under the lands other than such as should be necessary or consequent upon the working;" and they had power to surrender, if during the term the coal should be exhausted; it was held, (1) that they were entitled to let down the surface, provided that they did not injure or endanger existing or future buildings; and (2) that they were not entitled to let down the buildings, doing no unnecessary damage.[2]

(γ) *Prohibited Working of Specified Minerals.*

Haines *v.* Roberts.

In *Haines* v. *Roberts*[3] an Inclosure Act enacted, that it should be lawful for the lord of the manor to enter upon the allotments to search for and get coal, &c. It also enacted that the lord should not open any work on the surface within

[1] In the House of Lords, July 20th, 1893; varying the decision of the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), and restoring that of Vaughan Williams, J. And see New Sharlston Co. *v.* Westmorland, 1904, 2 Ch. 446, n., *per* Lord Halsbury.

[2] Brewer *v.* Rhymney Iron Co., 1910, 1 Ch. 766. The provision for making compensation appears more fully from 79 L. J. Ch. 335.

[3] 7 E. & B. 625, affirming Roberts *v.* Haines, 6 *ib.* 643.

forty yards of any dwelling-house then or thereafter to be erected, nor get any coal or ironstone under such dwelling-house within the perpendicular distance of forty yards from the foundations. It was held, that the prohibition against working within forty yards did not entitle the lord to work at a greater distance in such a manner as to interfere with the right of support.[1]

Dugdale *v.* Robertson.

In *Dugdale* v. *Robertson*,[2] a lease was made of the mines under 514 acres of land, delineated on a plan; with full liberty to work, and to open pits, &c., except in or upon certain demesne lands belonging to a mansion, and consisting of about four acres; provided that all pits or works sunk or raised for the purpose of working the minerals under certain ornamental grounds, surrounding the demesne lands, and coloured yellow upon the plan, should be sunk and raised at the furthest point from the mansion at the part coloured yellow. The lessees proceeded (but without infringing the special provisions) to excavate under the lands coloured yellow, and the mansion in consequence began to give way. It was held, that there was a right of support for the mansion.

Shafto *v.* Johnson.

A different construction was adopted in *Shafto* v. *Johnson*.[3] There the lessees of coal mines covenanted to work in a proper manner, and according to the best and most approved method of working, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every of the workable seams; and not knowingly to do or suffer to be done any wilful or negligent act, which might endanger the colliery, or occasion any loss thereto; and not to sink pits within 200 yards of a dwelling-house; and to leave unwrought the coal under a mansion, and under certain specified gardens, pleasure grounds and parks. The lease contained other provisions for the security of these specified parts of the surface, and for making compensation for damage to the parts not specially protected. It was held, that the whole provisions of

[1] As the result of the working, a dwelling-house was injured. But the jury found that, even without the weight of the house, the ground would have given way: see upon this point, *ante*, p. 306. And, having regard to the reference to houses in the Act, there was an implied right of support for the house: see *ante*, pp. 316 *et seq.*

[2] 3 K. & J. 695.

[3] 8 B. & S. 252, n.

the lease taken together showed a sufficient intention to exclude the right of support for the parts not specially protected. It was considered, that the leading features of the lease were (1) the intention, in preference to everything else, to provide for the safety of the mine; and (2) the covenant to get all the coal which could be got with safety to the mine.[1]

Eadon *v.* Jeffcock.

A different construction was also adopted in *Eadon* v. *Jeffcock*.[2] There the lease of a bed of coal reserved a minimum rent of 200*l.* as for 2 a. 1 r. 16 p., and a further yearly rent of 85*l.* per acre for coal actually got beyond the 2 a. 1 r. 16 p., "including all ribs and pillars left in working the coal," except certain pillars of specified dimensions, which the lessees bound themselves to leave during the whole of the term. The lessees also covenanted to work the mines in a good and workmanlike manner. The pillars specified in the lease were left. The lessees worked properly; but their working caused a subsidence, and this injured the surface and certain buildings which had been shortly before erected thereon.[3] It was held, that the defendants were not liable.[4]

(δ) *Express Provision as to Non-liability.*

Williams *v.* Bagnall.

In *Williams* v. *Bagnall*,[5] a grant was made of land, excepting the mines, with full power to work, without entering upon the land; and without being answerable for any injury whatsoever, which should arise to the land, or to any buildings which should at any time afterwards be erected thereon, by reason of the working, &c.; and without being liable to any action, &c., for, or on account of, any such injury. A lessee from the grantor of the excepted mines worked them; and he thereby caused the surface of the land to sink, and injured buildings which had been erected thereon subsequently to the grant. It was contended, that the provision relieving the grantor from liability applied, or might be taken to apply, as in the case of

[1] *Per* Wood, V.-C. The construction adopted in Shafto *v.* Johnson was approved in Taylor *v.* Shafto, 8 B. & S. 228, 251; as to which see *ante*, p. 229: see also Davis *v.* Treharne, 6 A. C. at p. 469.

[2] L. R. 7 Ex. 379.

[3] The land would have subsided without the buildings: see, upon this point, *ante*, p. 306.

[4] *Per* Cleasby and Martin, BB., Bramwell, B., doubting.

[5] 15 W. R. 272.

the compensation clause in *Harris* v. *Ryding*,[1] to damage other than that resulting from the removal of the support. It was, however, held, that the right of support was excluded.[2]

Buchanan *v.* Andrew.

So in *Buchanan* v. *Andrew*.[3] There there was a feu of lands, excepting the mines, with full working powers. The feuar contracted to build a house upon the land, and to maintain it in repair; but with a provision, that the superior should not be liable for any damage which might arise to the surface, or the house which might be erected thereon, by or through the working of the minerals by long-walled workings or otherwise, or which might arise from or through the setting or crushing of any coal-waste. The house was afterwards built; and it was damaged by the working of the minerals. It was held, that the feuar was without a remedy in damages.[4] And it was also held, that, as his right to an injunction depended on his right to damages, he was equally without a remedy by injunction.[5]

(*b*) *Evidence as to Circumstances or Object.*

Present application of foregoing pronouncements.

In most of the cases in which the foregoing pronouncements were made it was assumed that the mines could be worked so as not to produce subsidence; and could be so worked commercially. And these were or may have been the facts at times, when there were either no deep workings, or deep workings were the exception.[6] In most of such cases, therefore, no evidence was produced as to the circumstances in which the instrument of severance was executed, or the object which the parties had in view appearing from those circumstances. Indeed in cases under the Inclosure Acts, it would, having regard to the dates of the Acts, have been impossible to produce such evidence.[7] In modern times, however, deep workings have become usual; and, during the last thirty years, it has been common knowledge

[1] 5 M. & W. 60; *ante*, p. 333.

[2] The right of lateral support was claimed in addition to that of vertical support, but without success. See, upon this point, *ante*, pp. 305, 306.

[3] L. R. 2 Sc. & D. 286.

[4] Cf. Aspden *v.* Seddon, 10 Ch. 394; *ante*, p. 338; and distinguish Dixon *v.* White, 8 A. C. 833; *ante*, p. 335.

[5] See 2 Sc. & D. 291, 292, 296. See Bell *v.* Love, 10 Q. B. D. 562, 563.

[6] Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 46, 47, 49, 53; 1910, A. C. 383, 393.

[7] 1909, 1 Ch. 53.

in the mining world that it was impossible to carry on deep workings commercially without causing subsidence.[1]

Admissibility of evidence.

In modern instruments of severance, therefore, which contain provisions showing that the working of deep mines was contemplated, and the intention of which might otherwise be doubtful, evidence is admissible of the known and inevitable results of the contemplated workings; and it is a necessary implication from such evidence that subsidence was authorised.[2]

Generality of principle—*jus tertii*.

And the implication does not exist merely in the case of a grant or lease of mines. It equally exists in the case of an exception of mines from a grant or lease.[3] And it is not necessary to the existence of the implication that there should be a clause for compensating the injured party.[4] Nor, where there is a lease of a mine, with reserved liberties of working the lower mines, and there is a subsequent lease of the lower mines, is the position of the lower lessee affected by the fact, that, as between himself and the common lessor, he is under an obligation not to injure the upper lessee. The rights of the upper lessee depend upon his own title only, and the *jus tertii* is immaterial.[5]

Butterley Co. *v.* New Hucknall Co.

In *Butterley Co.* v. *New Hucknall Co.*[6] the plaintiffs were the lessees of an upper mine, under leases from three several lessors. The first lease gave the plaintiffs an option to take the lower mines. And it then provided, that, if the option was not exercised it should be lawful for the lessor and his tenants to enter upon the plaintiffs' mining area, and sink to and work the lower mines; and sink to, erect and use pits, buildings, engines, machinery, roads, &c. . . . under or across the roads, &c., and workings of the plaintiffs; so that such roads, &c., be not "unnecessarily" injured thereby; and that, in such case, the lessor should indemnify the plaintiffs against any "physical damage," that might be caused by the operations of the tenants of the lower mines to the mine or mining apparatus of the plaintiffs. The second lease reserved full powers to work the

[1] 1909, 1 Ch. 53.

[2] Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. 37, 46, 47, 49, 50, 53; 1910, A. C. 382—386, 392—393. See also the Scotch case of Anderson *v.* M'Cracken, 2 F. 780.

[3] Butterley Co. *v.* New Hucknall Co., 1909, 1 Ch. at 47.

[4] See the facts in the Butterley case as stated, *infra*.

[5] *Ib.*

[6] 1910, A. C. 381.

lower mines, and provided that the persons exercising the powers should not be liable for damage thereby caused. The third lease reserved similar powers, but provided that the plaintiffs should not be "unnecessarily" obstructed. The leases were executed in and subsequently to the year 1887. The defendants subsequently took leases from the same lessors of some of the lower mines. The first of the defendants' leases contained an exception of so much of the mines thereby demised as was necessary for the protection of the plaintiffs' mine, and provided that nothing contained therein should exempt the defendants from liability to the plaintiffs. The third of the defendants' leases provided that nothing contained therein should authorise the defendants to let down the plaintiffs' mine without their consent; and it also contained a covenant by the defendants to work without causing damage to the plaintiffs. The defendants worked in such a way as to cause the plaintiffs' mine under all their leases to subside. All the mines in question were deep mines. It was proved that it was impossible to work the lower mines to advantage without letting down the upper mines; and that this fact was known in the mining world in the year 1887. It was held, that the plaintiffs were without a remedy.[1] It may be mentioned that one of their lordships thought, that the word "physical" damage in the plaintiffs' first lease was intended to exclude consequential damage, such as the loss of profit.[2]

Application of decision to surface cases.

The actual decision was upon the respective rights of upper and lower mine owners. But, although there is a difference between the importance of support in such a case and in that where the respective rights are those of surface owner and mine owner,[3] the principle of the decision applies to the latter case also.

Non-application where knowledge not shown.

In order that the decision may apply it is essential to show, not merely impossibility of working without letting down, but knowledge of the fact at the crucial date.[4]

[1] Affirming S. C. 1909, 1 Ch. 37, which reversed S. C. 1908, 2 Ch. 475. The facts are insufficiently reported. Nothing appears from the reports as to the contents of the plaintiff's third lease, or of any of the defendant's leases.

[2] See 1910, A. C. 392, *per* Lord Atkinson.

[3] *Ante*, p. 301.

[4] If, after the Butterley case, authority for this may be thought necessary, it will be found in Agnew *v.* Knowles, a case before the V. C. of

General effect of decision.

Looking to the future, it may perhaps be that the Courts will be less eager than in the past to read a liberty (whether granted or reserved) to work "all" mines as meaning a liberty to work something less than "all" mines; even in cases where it is not possible to apply the *Butterley* decision.[1]

Sect. 3.—Special Railway and Canal and Similar Acts.

Classification of cases under special Railway Acts, &c.

In authorising the making and maintenance under special Acts of railways and canals and similar works, the legislature did not always proceed upon the same lines. Different views of policy prevailed at different times, producing different schemes of legislation, and involving different results in the relative positions of the surface owner and the mine owner. The enactments may be grouped under four classes:—(1) Those giving the surface owner a right of support *ab initio;* (2) those giving the surface owner a power to purchase either the mines themselves or the right of support from them; and giving the mine owner a corresponding power to work on the failure to purchase; (3) those imposing upon the mine owner a duty not to remove the support, but giving him a corresponding power to compel the purchase of the right: and (4) those under which the surface owner has neither the right of support, nor the power to purchase it.

(*a*) *Right of Support ab Initio.*

Cal. Rail. Co. *v.* Sprot.

In *Caledonian Railway Co.* v. *Sprot,*[2] an Act passed in 1827, after incorporating a railway company, and giving compulsory purchasing powers, provided, that it should be lawful for landowners, in selling their lands, to except the mines; and it also provided, that compensation should be made to any landowner, who should sustain damage through the exercise of any of the powers thereby conferred. Sprot conveyed to the company a portion of his land for the purposes of their railway. The deed excepted the mines; with full power to search for, win,

the Court Palatine of Lancaster. The case was ultimately taken to the Court of Appeal, and was compromised (May 12, 1911) after an intimation that the latter Court took the same view.

[1] See Butterley Co. *v.* New Hucknall Co., 1910, A. C. 391—392, *per* Lord Atkinson.

[2] 2 Macq. 449.

and carry away, the minerals. The House of Lords considered that the compensation clause referred exclusively to the execution by the company of their powers; that it could not refer to any damage which Sprot might have sustained by his own act in having granted (if he in fact had granted) by implication the right of adjacent and subjacent support; [1] and (according to the principle already stated [2]) that such a grant had in fact been made. It was, therefore, held that Sprot was not entitled to work, so as to withdraw adjacent or subjacent support.[3]

Elliot v. N. E. Rail. Co.

Elliot v. *North Eastern Railway Co.*[4] was a somewhat similar case. There an Act passed in 1834 incorporated the company, and recited the expediency of making the railway and of throwing a bridge over a river; and it then gave the company compulsory purchasing powers. Section 27 reserved to the landowners the mines under the lands to be purchased, with full working powers, "so that no damage or obstruction be done or thereby occur to or in such railway or other works." [5] Section 28 provided that as soon as the landowners in working such mines approached within twenty yards of any masonry or building belonging to the company they should give notice to the company; that the company might thereupon compel a sale within the twenty yards; and that, if they did not do so, the owners might work, provided they worked in the usual and ordinary manner, and did no avoidable damage. The company purchased land under their powers; and they then proceeded to construct their railway, and to build their bridge, making one end of the bridge rest on the land so purchased. The bridge was of great weight and solidity. The defendant was a lessee from the vendor of the mines under the land purchased. The House of Lords considered that the two sections were independent of each other; and that section 28

[1] Cf. R. *v.* Aire and Calder Nav. Co., 30 L. J. Q. B. 337, 351.

[2] *Ante*, pp. 316, 317.

[3] Cf. Caledonian R. Co. *v.* Belhaven, 3 Macq. 56. See also G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 27, 38, 40; Hammersmith, &c., R. Co. *v.* Brand, L. R. 4 H. L. 224; Aspden *v.* Seddon, 10 Ch. 404; G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 165, 166; N. B. R. Co. *v.* Turners, 6 F. 900.

[4] 10 H. L. C. 333.

[5] Cf. with these words the similar words used in Dudley Canal Co. *v.* Grazebrook, *post*, pp. 354, 355, and the different construction there placed thereon.

was intended to provide exceptional protection for works of weighty masonry in addition to, but not in substitution for, the protection afforded to all parts of the railway by section 27. It was, accordingly, held, (1) that the effect of the two sections taken together was that, except within twenty yards underneath the masonry (for which special provision was made), there was no power under any circumstances to work, unless on the condition of causing no damage or obstruction. And it was held (2) that section 28 referred exclusively to subjacent working; that the Act contained no provision as to adjacent working; and that the implied grant of the right of adjacent support was not, therefore, excluded.[1]

N. E. Rail. Co. *v.* Crossland.

So in *North Eastern Railway Co.* v. *Crossland*.[2] There an Act passed in 1830, after incorporating a railway company, and giving compulsory purchasing powers, reserved the mines under the land purchased to the landowner, but provided that in working them "no damage or obstruction be thereby done or occur to or in such railway or works." The company purchased land, together with the privilege of making an arched tunnel therein. The defendant was the successor in title of the vendor. It was held, that the Act gave the right of vertical support for the tunnel, and that the law gave the right of lateral support as flowing out of the contract.

Benfieldside Local Board *v.* Consett Co.

Benfieldside Local Board v. *Consett Co.*[3] was decided on similar grounds. There public highways were set out under an Inclosure Act. The Act reserved to the lord of the manor all mines, minerals, and quarries, under the commons; with power to do every act necessary for working and winning them as effectually as he could have done in case the Act had not been made, without paying any damages or making any satisfaction. The defendants, who were assignees of the lord, worked so that parts of one of the highways subsided. It was held, that it could not have been intended, that an Act, which appointed a public road, should at the same time legalise a

[1] Affirming N. E. R. Co. *v.* Elliot, 2 De G. F. & J. 423, which affirmed S. C. 1 J. & H. 145. As to the second point decided, cf. the position as to mines outside the prescribed distance under the Rail. & Wat. Cl. Acts, *post*, pp. 425 *et seq.*

[2] 2 J. & H. 565, 4 De G. F. & J. 550.

[3] 3 Exch. D. 54.

public nuisance by injuring the road; and that the defendants were therefore liable.[1]

Re Dudley—Jary *v.* Barnsley Corporation.

So in *In re Dudley*,[2] a decision under the Pub. Health Act, 1875. That Act obliged every local authority to keep in repair all sewers belonging to them; and empowered them, after giving reasonable notice to the owner or occupier, "to carry any sewer into, through, or under any lands whatsoever within their district," making compensation to all persons injured. It also authorised the purchase of easements, and it incorporated the Lands Cl. Act.[3] It was held, that the Act gave by implication to the authority in question the right to have sewers made under its powers supported by the subjacent minerals.[4] And so in *Jary* v. *Barnsley Corporation*,[5] a decision under the same Act. It was there intimated, that the implied right probably extended to lateral as well as subjacent minerals; and did so whether the lateral mines did or did not belong to the owner of the land in which the sewer was laid.

Normanton Gas Co. *v.* Pope.

So in *Normanton Gas Co.* v. *Pope*.[6] There an Act vested gas mains and gas pipes in a company, and provided for their maintenance; and empowered [7] the company to lay down, and from time to time maintain, additional and other mains and pipes, and to do all such acts as they might think proper for supplying gas. It was held, that the company were entitled to have both the original, and additional, or other, mains and pipes supported by the subjacent minerals.[8]

L. & N. W. R. Co. *v.* Evans.

So in *London and North Western Railway Co.* v. *Evans*.[9] There, by an Act of 1754, certain undertakers were authorised to make a brook navigable, and to maintain and use such navigation, and to make such new cuts and canals as might be

[1] See also L. & N. W. R. Co. *v.* Evans, 1893, 1 Ch. 29, 32. Cf. A.-G. *v.* Conduit Colliery Co., 1895, 1 Q. B. 301.

[2] 8 Q. B. D. 86.

[3] See ss. 15, 16, 175, 176, 308.

[4] See also South Staffordshire, &c., Co. *v.* Mason, 56 L. J. Q. B. at p. 256; L. & N. W. R. Co. *v.* Evans, 1893, 1 Ch. 29, 31, 32. The decision in *In re* Dudley led to the passing of the Pub. Health Am. Act, 1883, as to which, see *post*, pp. 377—379, 428—432.

[5] 1907, 2 Ch. 600, 613, 615, 619.

[6] 48 L. T. 666; affirmed, 52 L. J. Q. B. 629.

[7] Besides containing an express provision on the subject, the Act incorporated the Gas. Cl. Act, 1847 (10 & 11 Vict. c. 15).

[8] The Pub. Health Am. Act, 1883 (as to which see *post*, pp. 377—379, 428—432), applies to gas mains, &c., as well as to sewers.

[9] 1893, 1 Ch. 16.

necessary for the purpose ; first giving satisfaction to the owners of lands which should be made use of, or damaged, by carrying on the navigation, which satisfaction might be by a yearly payment, or by a sum in gross. The public were authorised to use the navigation, on payment of tolls. Persons under disability were empowered to sell lands. The Act contained no reference to minerals. The brook was made into a canal, but no conveyances to the undertakers were made. Compensation was made to landowners by annual payments. The defendants, who were the owners of coal under the canal, worked it so as to cause a subsidence. It was held, that the legislature must be taken to have intended to give a right of support.[1]

Clippens Oil Co. *v.* Edinburgh, &c., Trustees.

And so in *Clippens Oil Co.* v. *Edinburgh, &c., Trustees.*[2] There an Act of 1819 provided, that certain undertakers should enter in books full accounts of all payments made ; and it authorised them to take and use lands for reservoirs, and to make cuts for supplying water, and to lay pipes for that purpose, giving one month's notice of their intention to the owners of the lands, and making satisfaction to them ; and it contained provisions for assessing (in default of agreement) the sums demanded as damage. It contained no reference to minerals. It was held, that there was a right of support for a pipe laid under the Act.[3]

Severance of property in land not essential.

It is not, it will be observed, essential in such cases to the acquisition of the right that there should be a severance of property in land. In several of the cases [4] the interest vested in the undertakers was not a right of property in land, but a mere right to make and maintain works on land which remained the property of another.

Knowledge as to minerals—compensation for support specifically.

Nor is it essential that the existence of the minerals should have been known ; or that, where compensation is provided for, and has been received, the question of support should have been, in fact, considered in arriving at the amount.[5]

Performance of conditions precedent.

Where there are under such Acts conditions precedent to the acquisition of the right of support, they must be complied

[1] Reversing S. C. 1892, 2 Ch. 432.

[2] 1904, A. C. 64.

[3] Affirming S. C., 3 F. 156 : see also Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T. 275, at p. 276.

[4] *Ante*, pp. 348, 349, and *sup.*

[5] Clippens Oil Co. *v.* Edinburgh, &c., Trustees, 1904, A. C. 71, 72, *per* Lord Robertson.

with. But where, as in *Clippens Oil Co.* v. *Edinburgh, &c., Trustees*, the Act required notice to be given, it was, after a long distance of time, presumed to have been given.[1] And where, as in *London and North Western Railway Co.* v. *Evans*,[2] and *Clippens Oil Co.* v. *Edinburgh, &c., Trustees*, satisfaction could have been successfully claimed for the damage done to a landowner by his having to leave support, it was, after a long distance of time, presumed either to have been made,[3] or to have been waived.[4] And where, as in the same cases, the Act spoke of "satisfaction," it was held that this did not mean a money satisfaction only.[5] And where, as in *Jary* v. *Barnsley Corporation*,[6] the Act provided for the reference to arbitration of claims to compensation; and there was a reference accordingly, and an annual payment was awarded; and there was no evidence that the umpire had not taken into consideration (as he ought to have done) the fact that the rights created by the Act included a right of support; it was held that he must be presumed to have done what he ought to have done.

Effect of enjoyment for twenty years.

In cases arising under the Acts now in question an enjoyment of the support for twenty years is immaterial. The rights of the parties depend upon the Acts alone.[7]

Claim of right of support against non-grantor of land.

In the great majority of cases the person against whom the right of support is claimed is himself the grantor of the land to the company or authority, or his successor in title. But this is not always so. He may be, as already mentioned,[8] another person.

Compensation—whether always claimable by grantor of land.

Where the right is acquired against the grantor of the land, or his successor in title, the question arises, whether compensation can always be claimed by him in respect of the liability to leave the support; or whether it can only be so claimed under an express provision. In *North Eastern Railway Co.* v. *Elliot*,[9] Wood, V.-C.; and, on appeal,[10] Lord Campbell; stated,

[1] See 1904, A. C. at 71.

[2] See also Glamorganshire Canal Nav. *v.* Nixon's Co., 85 L. T. 53.

[3] See 1893, 1 Ch. 16; 1904, A. C. at 69, 70, 71. See also Edinburgh, &c., Trustees *v.* Clippens Oil Co., *sup.* at p. 276.

[4] See Edinburgh, &c., Trustees *v.* Clippens Oil Co., *sup.* at p. 276.

[5] See 1904, A. C. at 69, 71.

[6] 1907, 2 Ch. 600.

[7] See Glamorganshire Canal Nav. *v.* Nixon's Co., *sup.*; Clippens Oil Co. *v.* Edinburgh, &c., Trustees, 1904, A. C. at 72. *Cf. post*, p. 366. As to enjoyment for twenty years in ordinary cases, see *ante*, pp. 321—323.

[8] See *ante*, pp. 318, 319.

[9] 1 J. & H. 153, 154.

[10] 2 De G. F. & J. 432.

in effect, that, when the purchase-money for the land or easement is being ascertained, the landowner has an inherent *primâ facie* right to receive, as part of it, compensation in respect of the liability to leave support. Wood, V.-C., repeated this view in *North Eastern Railway Co.* v. *Crossland*,[1] and Knight-Bruce, L.J., apparently shared it, when that case was under appeal.[2] However, in *In re Dudley*[3] and *London and North Western Railway Co.* v. *Evans*,[4] both of which were before the Court of Appeal, it was evidently considered, that in the absence of an express provision, the right to compensation could not be claimed. For in each of the latter cases the Court construed the Act, to see whether such express provision did not exist; and, in *London and North Western Railway Co.* v. *Evans*, did so to avoid, if possible, the necessity of deciding that the Act had "confiscated" the property of an individual for the benefit of the public. It is submitted, that the view taken in *North Eastern Railway Co.* v. *Elliot*, and *North Eastern Railway Co.* v. *Crossland*, is correct.[5] It has been already seen, that "the *status quo* of support passes with the property in the land . . . as an incident to the land itself, *sine quo res ipsa haberi non debet*."[6] If this view is correct, no case of "confiscation" (in the absence of clear words showing an intention to confiscate[7]) can ever occur.

Compensation—whether always claimable by non-grantor of land.

A similar question arises, where the right of support is acquired, not against the grantor of the land or his successor in title, but against another person. In such a case, it may well be, that express words are necessary before the right to compensation arises; and it is submitted, that the observations

[1] 2 J. & H. 578.

[2] 4 De G. F. & J. 559, 560.

[3] 8 Q. B. D. 96.

[4] 1893, 1 Ch. 29, 32, 33.

[5] It should be stated that there were words in Cal. R. Co. *v.* Sprot, *ante*, pp. 346, 347; and N. E. R. Co. *v.* Crossland, *ante*, p. 348 (see a fuller statement of the Act in question in the latter case in R. *v.* Leeds, &c., R. Co., 3 A. & E. 684), similar to those which were construed in *Re* Dudley, 8 Q. B. D. 86. But they were not even referred to in the judgments.

[6] See *per* Lord Selborne in Dalton *v.* Angus, 6 A. C. 791, cited *ante*, p. 322.

[7] Legislation will not be construed as interfering with existing rights unless a clear intention to do so can be gathered: R. *v.* L. & N. W. Ry. Co., 1899, 1 Q. B. at p. 944. The legislature is not, however, incapable of an act of confiscation, even where no motive is apparent: see Pountney *v.* Clayton, referred to *post*, pp. 399, 400.

of the Court of Appeal in *In re Dudley* and *London and North Western Railway Co.* v. *Evans* already mentioned [1] ought to be read as exclusively applicable to such a case. Even if this view be accepted, the decisions upon the construction of the compensation clauses there in question are not without importance; as they would be authorities upon similar clauses in cases between a company or authority, and a non-grantor of the land. It was in the former case held, that compensation in respect of the liability to leave support might be claimed under the words "where any person sustains any damage by reason of the exercise of any of the powers of this Act;" and in the latter case a similar decision was arrived at upon the words "first making satisfaction to the owners . . . of such lands . . . as shall be . . . made use of."

Compensation—when payable to grantor of land.

Where compensation in respect of the liability to leave support is payable to the grantor of the land or his successor in title, it should usually be claimed as soon as the company or authority have constructed their works. It is usually then payable; and payable in respect as well of prospective as of actual injury. If the mine owner postpones making his claim until the time when, but for the Act, he would be in a position to work, he will usually be too late.[2] And in such a case he cannot rely upon the usual words providing compensation for future injury through the exercise of the statutory powers. Such words only apply to damage not contemplated, or not capable of being ascertained, when the works are constructed.[3] It has been intimated, however, that the obligation to make compensation under section 308 of the Public Health Act, 1875, is not a condition precedent to the right to lay a sewer under that Act; and therefore that the question of compensation under that section may be, and often is deferred.[4]

Compensation—when payable to non-grantor of land.

Where compensation in respect of the liability to leave support is payable, not to the grantor of the land or his successor in title, but to another person; and the claim is

[1] See preceding page.

[2] See R. *v.* Aire, &c., Nav., 30 L. J. Q. B. 337; Normanton Gas Co. *v.* Pope, 52 L. J. Q. B. 629; Glamorganshire Canal Nav. *v.* Nixon's Co., 85 L. T. 53. Cf. Great Laxey Mining Co. *v.* Clague, 4 A. C. 115, *post*, p. 459.

[3] See R. *v.* Aire, &c., Nav., 30 L. J. Q. B. 351.

[4] Jary *v.* Barnsley Corporation, 1907, 2 Ch. at p. 618: see, however, *Re* Dudley, 8 Q. B. D. 86, 94.

not made under section 308 of the Pub. Health Act, 1875; it is not certain when it should be made. According to *R.* v. *Leeds, &c., Railway Co.*,[1] where the person claiming was a prior lessor under the vendor, the claim should be made when the works are constructed. According to *Pettiward* v. *Metropolitan Board of Works*,[2] where the person claiming was a prior remainderman, it may be made at any time. It has been intimated, that if the Public Health Act, 1875, confers a right of lateral, as well as subjacent support, and does so whether the lateral mines do or do not belong to the owner of the land in which a sewer is laid;[3] and compensation is therefore recoverable in respect of the obligation to leave such lateral support; it may be claimed at any time.[4]

Compensation—how recoverable.

The compensation to which, under the Pub. Health Act, 1875, and the Gas Cl. Act, a mine owner is entitled, is recoverable by arbitration, not action.[5]

(β) *Power to purchase Mines or Right of Support and Corresponding Power to work on Failure to purchase.*

Generally.

In some of the Acts now in question the power to purchase is a power to purchase the mines themselves. In others it is a power to purchase the mere right to prevent the mine owners from working. The legal result is not, of course, the same. But the practical differences are few.

Dudley Canal Co. *v.* Grazebrook.

In *Dudley Canal Co.* v. *Grazebrook*,[6] an Act passed in 1776, after incorporating the company, gave power to construct a canal and aqueducts, making satisfaction for damage to the owners of lands taken or prejudiced. Provision was made for determining from time to time what sum should be paid for the purchase of lands, and what other sum should be paid for damage to the owners of lands by the making or maintaining the canal, or the flowing or leaking of water over or through the banks. The public were authorised to navigate upon payment of tolls. The Act then provided, that no owner of

[1] 3 A. & E. 683. This case was approved in R. *v.* Aire, &c., Nav., 30 L. J. Q. B. 337.

[2] 19 C. B., N. S. 489.

[3] See *ante*, p. 349.

[4] See Jary *v.* Barnsley Corporation, 1907, 2 Ch. at p. 619.

[5] Normanton Gas Co. *v.* Pope, 52 L. J. Q. B. 629; Jersey *v.* Neath, &c., Union, 22 Q. B. D. 555.

[6] 1 B. & Ad. 59. See also L. R. 7 Q. B. 244, where the provisions of the Act are fully stated.

mines should work under any tunnel, or within twenty yards of the same, without the consent of the company; nor should any minerals be got under any part of the canal or aqueducts or within or under any land lying within twelve yards on either side, "except as hereinafter mentioned," without such consent. The Act also provided, that when the owner of any mine lying under the canal or aqueducts, or "within the distance hereinbefore limited," desired to work he should give the company notice. The company might thereupon inspect the mines, and compel a sale, if they thought proper; and, in default of such inspection or purchase, the owners might work. The Act also provided, that nothing therein contained should defeat the right of the owners to the mines under the canal or aqueducts; and that, subject to the conditions in the Act contained, the owners might work provided that "no injury be done to the said navigation." The canal and aqueducts were made; and an owner of mines lying under an aqueduct gave notice of his desire to work. He then proceeded to work in the ordinary and proper manner, and without doing unnecessary damage; and the aqueduct was in consequence injured. It was considered that the only way of reconciling the words "no injury be done to the said navigation," with the provisions giving a power to compel a sale, was to construe "no injury" as meaning "no unnecessary or extraordinary injury;" [1] that, if the mines were not purchased, the owner's right to get them ought to remain as complete as if no canal had been made; and that, if he exercised such right, the company ought to run the risk of the consequences. It was accordingly held, that the company were without a remedy.

Stourbridge Canal Co. *v.* Dudley.

Dudley Canal Co. v. *Grazebrook* was approved and followed in the Exchequer Chamber in *Stourbridge Canal Co.* v. *Dudley*,[2] a decision under a similar Act.[3] In the latter case, even if

[1] Cf. this construction with the construction placed on the words "so that no damage or obstruction be done or thereby occur to or near such railway or other works," in Elliot *v.* N. E. R. Co., and on similar words in N. E. R. Co. *v.* Crossland, *ante*, pp. 347, 348. Cf., also, Knowles *v.* L. & Y. R. Co., 14 A. C. 248, 253, 257.

[2] 3 E. & E. 409.

[3] See also Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 265, 272, 274, 276; 8 *ib.* 42, 46. These cases overrule Birmingham Canal Co. *v.* Hawkesford, 7 East, 371, n. See also Wyrley Canal Co. *v.* Bradley, 7 East, 368. In L. & Y. R. Co. *v.* Knowles, 20 Q. B. D. at p. 403, Lord Esher

the land had remained in its original state, a portion of the surface would have been let in by the mining operations.[1]

Birmingham Canal Co. *v.* Dudley.

Birmingham Canal Co. v. *Dudley* [2] was a decision under the same Act as that which applied in *Dudley Canal Co.* v. *Grazebrook*, but it raised a different question. It was there held, that the prohibition in the case of the twenty yards' limit was subject to the same exception as that applicable to the twelve yards' limit; and that the company could not therefore require the minerals within the twenty yards' limit to be left unworked without paying for them. This case followed a decision under similar circumstances in *Birmingham Canal Co.* v. *Swindell*.[3]

Mid. Rail. Co. *v.* Checkley.

In *Midland Railway Co.* v. *Checkley* [4] a Canal Act reserved the mines under the land, through which the canal was to be made, to the owners of the land; and empowered them (subject to the restrictions thereinafter contained) to work, not thereby injuring the navigation or the works. It then prohibited the owners of mines from working under or within ten yards from the canal without the consent of the canal proprietors. But the canal proprietors were, if they withheld their consent, required to purchase the mines. The defendant was the lessee of a quarry adjacent to the canal, and he derived title from the person who had sold to the proprietors the land on which the canal was made. The defendant commenced working more than ten yards from the canal, but offered to stop upon being paid. It was held (1) that the canal proprietors were entitled to adjacent support beyond the ten yards' limit. But it was held (2) that the provisions of the Act as to payment extended by implication to workings beyond the limit; and that the canal proprietors were not, therefore, entitled to stop the working without making payment in the same manner as if the quarry had been within the limit.

Remarks on Mid. Rail. Co. *v.* Checkley.

The second point in this case was decided on the ground, that the legislature could not have intended that a company, who could only obtain the right of support within a prescribed

suggested a doubt as to the correctness of Dudley Canal Co. *v.* Grazebrook, but admitted that he was bound by it. In A.-G. *v.* Conduit Coll. Co., 1895, 1 Q. B. at p. 308, Wright, J., suggested that the decision in Dudley Canal Co. *v.* Grazebrook might apply to cases under the Highw. & Locom. Am. Act, 1878, as to which see *ante*, p. 64.

[1] See 3 E. & E. at p. 417.

[2] 7 H. & N. 969.

[3] 7 H. & N. 980, n.

[4] 4 Eq. 19.

limit on paying for it, were to have it without payment outside that limit. This, however, may well have been intended. There was a right to prohibit working within the limit, on payment, which was absolute, and was therefore independent of whether it was such a working as would cause damage to the canal. If it was intended, that the position of the canal proprietors should be precisely the same outside the limit as within it, there was no purpose in fixing the limit.[1]

No obligation on company to purchase right of support.

It is of the essence of Acts of the kind now in question, that the company may purchase the mines or the right of support, if they think it desirable; but that they are under no obligation to purchase. They may prefer to run the risk of incurring, or even to incur, a small injury. The position of the company in this respect was recognised in several of the cases already cited.[2]

Dunn v. Birmingham Canal Co.

In *Dunn* v. *Birmingham Canal Co.*[3] it was admitted that the defendants had power to purchase the mines or not, at their option. But it was contended that they were under some duty to the plaintiff to prevent injury to his mines by flooding, either by purchasing in exercise of their option, or by withdrawing the water from the canal. The Act in that case was the same as that which applied in *Dudley Canal Co.* v. *Grazebrook.*[4] The plaintiff, who was the owner of mines under the canal, gave the defendants notice of his intention to work. The defendants refused to purchase, and the plaintiff then worked. He worked properly, and without negligence; but knowing that, as the result of his working, his mines would probably be flooded. The canal was properly constructed and properly maintained. The effect of the working was that the mines were flooded. It was held, that the defendants were under no duty to purchase in exercise of their option; which would, in fact, have changed their option into an obligation. And it was also held, that they were under no duty to withdraw the water

[1] Cf. the second of the two points decided in Elliot *v.* North Eastern Railway Co., *ante*, pp. 347, 348, and the position as to mines outside the prescribed distance under the Rail. and Wat. Cl. Acts, *post*, pp. 425 *et seq.*

[2] See *per* Bayley, J., in Dudley Canal Co. *v.* Grazebrook, 1 B. & Ad. 72, 73; *per* Martin, B., in Stourbridge Canal Co. *v.* Dudley, 3 E. & E. 426. Cf. the position under the Rail. & Wat. Cl. Acts, *post*, p. 421.

[3] L. R. 7 Q. B. 244; 8 *ib.* 42.

[4] See *ante*, pp. 354, 355, where the provisions of the Act are stated.

from the canal; which it was their business to keep open for the accommodation of the public. It was, therefore, held, that the plaintiff was without a remedy by action.[1]

No express power to work.

In most of the Acts now in question, an express power is given to the mine owner to work his mines, if the surface owners do not exercise their option of purchase. An express power to work is not, however, essential to the existence of the option.

Chamber Colliery Co. *v.* Rochdale Canal Co.

Thus in *Chamber Colliery Co.* v. *Rochdale Canal Co.*[2] The Act in that case provided, that, if the owner of any mines should, in pursuing them, work "near to or under" the canal, so as in the opinion of the canal proprietors to endanger or damage the same, or in the opinion of the mine owner to endanger or damage the further working thereof, it should be lawful for the canal proprietors to treat with the mine owner for all such minerals "near or under" the canal, as should be thought proper to be left for the security or preservation of the canal or mines; that, in case of disagreement as to the amount, it should be assessed by a jury; and that, upon payment, the mine owner should be restrained from working. The plaintiffs, who were the owners of mines laterally adjoining the canal, gave notice that they were about to work; and required the defendants to treat with them. The defendants informed the plaintiffs that they might work if they thought proper. An arbitrator found that, if the plaintiff's mines were worked within the pillars set out by him, the result would be as follows:—(1) There would be no leakage from the canal into the mines. (2) There would be some subsidence of the canal. (3) Such subsidence would not interfere with the navigation. (4) Such subsidence would necessitate repairs to the towing paths, banks, and bridges, which probably would be spread over a period of eight or ten years, and cost 1,000*l.* or 1,200*l.* And he found (5) that the value of the coal in the pillars was 12,688*l.* Upon these findings he directed that the defendants should pay the 12,688*l.* to the plaintiffs; and that, upon such payment, the plaintiffs should be restrained from working within the pillars. This direction was upheld by a Divisional Court; who were,

[1] The Exch. Cham. unanimously affirmed the majority (Cockburn, C.J., and Mellor and Lush, JJ., Hannen, J., dissenting) of the Queen's Bench. See further, as to this case, *post*, p. 516.

[2] 1895, A. C. 564.

however, reversed by the Court of Appeal,[1] upon a ground to which reference will be subsequently made.[2] Upon appeal to the House of Lords it was held, that the plaintiffs were entitled to work within the pillars, unless the defendants paid them compensation; and that the defendants were not bound to make such payment, if they preferred to allow the working. And, upon this ground, the decision of the Court of Appeal was affirmed.[3]

Where danger of flooding.

In canal cases danger to the canal from subsidence is not the only danger, which may be apprehended. Danger to the mine from flooding may also be apprehended; and the question arises, What in such a case is the position of the mine owner? Acts like the Dudley Canal Act usually contain provisions of the widest kind for compensating persons who suffer damage by the execution of the statutory powers.[4] It is probable that the mine owner can in such cases avail himself of these provisions; at all events if he proceeds at the proper time, and before working within the area of danger.[5] However, in Acts otherwise like the Dudley Canal Act, the mine owner would not be entitled to a remedy, even if there were no provisions for compensation.[6] A different course is open in Acts like the Rochdale Canal Act. In *Chamber Colliery Co.* v. *Rochdale Canal Co.*[7] it was found that there would be no leakage from the canal into the mines. But, if the finding had been different, the mine owners would have been entitled to compel the purchase of the right of support, and the canal owners would have had no option in the matter.[8]

Mines owned by non-grantor of land.

It will be noticed, that, under the Acts now in question, the power to purchase the mines or the right of support is not confined to mines owned by the original grantor to the company, or his successor in title. It applies equally to mines owned by another person. In this respect the Acts now in

[1] 1894, 2 Q. B. 632.

[2] *Post*, pp. 366, 367.

[3] In Barnsley Canal Co. *v.* Twibell, 7 Beav. 27, it seems to have been assumed that the defendant (who was the lessee of laterally adjoining mines), could not have worked with safety, but the point was not argued.

[4] See *ante*, pp. 354, 355.

[5] See L. R. 7 Q. B. 262, 263, 264, 272, 273; 8 *ib.* 46, 47, 48, 52. See *contra*, 7 *ib.* 280 *et seq.*

[6] See L. R. 8 Q. B. 47, 48, 51, 52, 53. See also Blyth *v.* Birmingham Wat. Co., 11 Exch. 781; Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679; Madras Co. *v.* Carvetinagarum, 22 W. R. 865; Dixon *v.* Metropolitan Board, 7 Q. B. D. 418.

[7] 1895, A. C. 564.

[8] See pp. 574, 575, *per* Lord Herschell; 580, 581, *per* Lord Watson.

question differ from most of those mentioned in division (*a*) of the present subject.[1]

Measure of compensation —generally.

In *Rugby, &c., Co.* v. *L. & N. W. Rly. Co.*[2] an Act passed in 1833 authorised the construction of a railway. By section 54 mines and minerals (including limestone[3] by name) were excepted from the purchase of lands; and might, "subject to the restrictions hereinafter contained"; be worked as if the Act had not been passed. Section 55 provided, that, upon the receipt of a notice from the proprietor of mines lying under or within 40 yards of the railway of his desire to work, the railway company might purchase them or any part of them. And section 58 provided, that no shaft, pit or quarry should be dug, sunk or made "in or on" the railway. The claimants were the owners of land on both sides of the railway, and of limestone lying under their land and under the railway. They had a cement factory on this land, in which they used and turned into cement the limestone which they quarried; but, owing to the cost of carriage, the limestone when quarried had no market value other than its value to the claimants for use in their factory. The claimants, by entering upon their property, could and would have worked the limestone lying under the railway without going on to the surface of the railway; but the effect would have been to cause the subsidence of the rails and ballast. The claimants gave notice of their intention to work the limestone within the 40 yards' limit. The railway company gave separate notices to treat: one a notice in respect of the stone within the 40 yards, but not under the railway; and the other a notice in respect of the stone under the railway. It was held (1) that the value of the limestone to the claimants was what they might fairly be expected to have made out of it by working it in the ordinary and reasonable manner in which it would have been worked but for the notice to treat; (2) that the profits which the claimants would have made by turning it into cement might properly be taken into consideration as an indication, though not as a measure, of that value; (3) that the value was not affected by the fact that the claimants owned large quantities of other limestone which they might have worked

[1] See, as to this, *ante*, pp. 346 *et seq.*

[2] 1908, 2 K. B. 606.

[3] Whether, having regard to the recent pronouncements, limestone is, in fact, a mineral, see *ante*, pp. 16, 17.

instead of the stone in question;[1] and (4) that the words "subject to the restrictions hereinafter contained" in section 54 included a reference to section 58; that a working under the railway, without going on the surface of the railway, would have involved the making of a quarry "in," though not "on" the railway, and would have been in contravention of section 58; and that the limestone under the railway had therefore no assessable value.[2]

Measure of compensation—*jus tertii.*

A mine owner, whose mines are purchased, is only entitled to be compensated according to the extent of his interest. Where, however, a lease contained a covenant to work mines and raise coal thereout, until the whole of such mines, or as great a quantity as by working in a diligent manner could be gotten, should be worked out, "except the ribs or pillars, which must necessarily or which the lessors might require to be left;" and the lessee claimed compensation under a Canal Act; it was held, that the exception was a mere partial exoneration from the obligation to work, and did not itself amount to a covenant not to work the excepted ribs.[3] It was also intimated, that, if such a covenant could have been implied, it might be considered so unreasonable that the Court would refuse to enforce it specifically.[4] It was in the same case doubted, whether the canal company could in any event rely upon a *jus tertii*, which the lessors might or might not insist upon.[5] But this doubt does not seem consistent with *Rugby, &c., Co.* v. *L. & N. W. Rly. Co.* already referred to,[6] or with what (it is submitted) is the position on a similar point under the Wat. Cl. Act.[7]

Interest.

Where, under the Acts now in question, the notice to the mine owner involves (as it frequently does) a purchase of the mines themselves, the mine owner is entitled, *primâ facie*, from the date of the notice, to interest on the purchase-money.[8]

[1] Reversing S. C., 1908, 1 K. B. 925.

[2] Per Sir G. Barnes and Farwell, L.J.; reversing S. C. 1908, 1 K. B. 925, Kennedy, L.J., dissenting.

[3] Swindell *v.* Birmingham Canal Nav., 9 C. B., N. S. 241, 277.

Ib. 278, *per* Williams, J. In the same case, however, Willes, J., held that "might require to be left" meant "reasonably require," &c.: see pp. 282, 283.

[5] *Ib.* 278, *per* Williams, J.

[6] See *sup.*, the decision upon the fourth point.

[7] See *post*, pp. 414, 415.

[8] Fletcher *v.* L. & Y. R. Co., 1902, 1 Ch. 901: cf. Richard and G. W. R. Co., 1905, 1 K. B. 68, *post*, p. 415.

But he is not so entitled, when the purchase-money was not to become payable until the happening of a future event.[1]

Working after notice—withdrawal of notice.

A mine owner, who has given the statutory notice, and who becomes entitled to payment thereunder, does not lose his right by merely afterwards proceeding to work his mines. Such a working can only entitle the company to damages or an injunction in independent proceedings; or to a reduction in the amount to be paid.[2] On the other hand, a notice once given, and acted on by the company, cannot be withdrawn; unless perhaps with the consent of the company.[3]

Different objects of preceding and present Acts.

The difference in general intention and results between the Acts discussed under divisions (*a*) and (*β*) of the present subject, may be thus stated:—In cases like *Caledonian Railway Co.* v. *Sprot*,[4] there was no reason why the principle, that, when a grant is made for a particular object known to both parties at the time of the grant, a reasonable degree of support for the due execution of that object is impliedly granted,[5] should not be adopted.[6] In cases like *Dudley Canal Co.* v. *Grazebrook*,[7] on the other hand, the companies were not in the first instance, in purchasing the surface, to be obliged to purchase or make compensation in respect of the mines. If they thought it likely that the mines might not be worked for an indefinite period, they might postpone purchasing or making compensation until the necessity arose.[8] The policy of the Acts under which the latter cases arose was similar to that of the Rail. & Wat. Cl. Acts.[9]

Minerals outside prescribed distance.

So far as regards minerals outside the prescribed distance, it is submitted that the position is similar to that under the Rail. & Wat. Cl. Acts.[10]

[1] See Cal. R. Co. *v.* Carmichael, L. R. 2 Sc. & D. 56.

[2] Swindell *v.* Birmingham Canal Nav., 9 C. B., N. S. 241, 279, *per* Williams, J.

[3] *Ib.*

[4] *Ante*, pp. 346, 347.

[5] *Ante*, pp. 316, 317.

[6] See Aspden *v.* Seddon, 10 Ch. 404, *per* Mellish, L.J.

[7] *Ante*, pp. 354 *et seq.*

[8] See the observations of Bayley, J., in Dudley Canal Co. *v.* Grazebrook, 1 B. & Ad. 72; and Cockburn, C.J., and Hannen, J., in Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 256, 276, 277, 279. See also Wyrley Canal Co. *v.* Bradley, 7 East, 372.

[9] See *post*, pp. 380 *et seq.*

[10] As to which, see *post*, pp. 395, 425.

(γ) *Duty not to remove Support and Corresponding Power to compel Purchase of Right.*

In *Cromford Canal Co.* v. *Cutts*,[1] an earlier section of an Act reserved the mines under the land through which a canal was to be made to the owner of such land, and empowered him (" subject to the conditions and restrictions herein contained ") to work, " not thereby injuring, prejudicing or obstructing " the canal. A later section provided, that, if the owner of any mines should in pursuing them work " near or under " the canal, so as in the opinion of the canal proprietors " to endanger or damage the same," or in the opinion of the mine owner " to endanger or damage the further working thereof," it should be lawful for the canal proprietors to treat with the mine owner for all such minerals " near or under " the canal, as should be thought proper to be left for the security or preservation of the canal or mines ; that, in case of disagreement as to the amount, it should be assessed by a jury ; and that, upon payment, the mine owner should be restrained from working. It was held, that, if an owner of subjacent mines sustained injury by getting less coal, or by working in a less beneficial manner for the sake of not injuring the canal, he had a right to compensation, and that he might take proceedings for the purpose of ascertaining whether he in fact sustained such injury.

Cromford Canal Co. *v.* Cutts.

In *Knowles* v. *Lancashire and Yorkshire Railway Co.*[2] the Act contained similar sections. There the owners of a coal mine under and near the canal gave the canal company notice that they intended to work : the company declined to purchase or pay compensation ; and the owners then worked, and thereby damaged the canal. The working was in the usual mode, without negligence, and without doing unnecessary damage save in not leaving sufficient support. It was held by the House of Lords, that the mine owners were liable in damages for working to the injury of the canal.[3] " The condition on which the statute allows the mines to be worked must be borne

Knowles *v.* L. & Y. Rail. Co.

[1] 5 Rail. Cas. 442.

[2] 14 A. C. 248.

[3] Affirming L. & Y. R. Co. *v.* Knowles, 20 Q. B. D. 391. Acquiescence in the working was relied on, but without success : see L. & Y. R. Co. *v.* Knowles, 20 Q. B. D. 401. See also Chamber Colliery Co. *v.* Rochdale Canal Co., 1895, A. C. 564.

in mind. The section is framed on the supposition that the mine owner keeps in view his statutory liability. . . . The proprietors of the canal may apply . . . if they apprehend damage or danger to the canal. On the other hand, when the working of a mine has reached a point at which the mine owner finds, that, having regard to the proximity of the canal and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine." [1]

Difference in language between earlier and later sections.

The difference in language between the earlier and later sections of the Acts now in question will be noticed. The earlier section is confined to mines excepted from the sale to the canal company. The latter section applies to workings "near or under" the canal. "Section 38 gives rights and remedies to a larger class of persons than the mine owners who are mentioned in section 37. Thus it may refer to owners of a mine under the canal, which, having been severed from the other land before the construction of the canal, could not have been reserved to the owners of the surface land. Further, it applies to owners of mines who are working near the canal. These owners of mines might be persons from whom a portion of the land had been purchased, or they might be owners from whom no land had been purchased. They might therefore be owners of land not affected by the reservation in section 37, and yet within the scope of section 38." [2]

Mines owned by non-grantor of land.

Accordingly, under the later of the sections of the Acts now in question, the power to compel the purchase of the right of support applies as well to mines owned by another person as

[1] See 14 A. C. 256, *per* Lord Macnaghten. See also Chamber Colliery Co. *v.* Rochdale Canal Co., 1895, A. C. 564: see p. 573; New Moss Coll. Co. *v.* M. S. & L. R. Co., 1897, 1 Ch. 725; M. S. & L. R. Co. *v.* Johnson, 36 Ch. D. 629, n., was a similar case. See also Evans *v.* M. S. & L. R. Co., *ib.* 626, which arose under a similar Act. Cf. the Scotch case of Linlithgow *v.* N. B. R. Co., 1910, 2 S. L. T. 115.

[2] L. & Y. R. Co. *v.* Knowles, 20 Q. B. D. 405, *per* Fry, L.J.; Knowles *v.* L. & Y. R. Co., 14 A. C. 254, *per* Lord Halsbury; Chamber Colliery Co. *v.* Rochdale Canal Co., 1895, A. C. 574, *per* Lord Herschell; 585, *per* Lord Macnaghten. Cf. the provisions of the Rail. Cl. Act, and see *post*, pp. 393, 394.

to mines owned by the original grantor to the company or his successor in title. In this respect the Acts now in question, while they differ from most of those mentioned in division (*a*)[1] of the present subject, resemble those mentioned in division (β).[2]

Adjacent mines—Chamber Colliery Co. *v.* Rochdale Canal Co.

The statutory liability imposed on the mine owner by the Acts now in question applies exclusively to the mines mentioned in the earlier of the sections. There is no statutory liability as regards mines mentioned only in the later of the sections; and that section is the only one applicable to laterally adjoining mines. The decision in *Knowles* v. *Lancashire and Yorkshire Railway Co.*[3] does not, therefore, apply to cases where the only mines in question are those which laterally adjoin. This was decided in *Chamber Colliery Co.* v. *Rochdale Canal Co.*;[4] where there were similar sections, and the facts of which have been already stated.[5]

New Moss Coll. Co. *v.* M. S. & L. Rail. Co.

And, although the mines in question in *Knowles* v. *Lancashire and Yorkshire Railway Co.* were adjacent as well as subjacent, the decision must be taken to have applied to the subjacent only. As regards adjacent mines, it is immaterial that their owner is also the owner of the subjacent. The mere fact that he is under a statutory liability as to the latter does not place him under a statutory liability as to the former also. As regards adjacent mines he is in the same position in relation to the company as if another person were the owner of the subjacent.[6]

Certainty of no injury.

And the earlier sections of such Acts do not entitle a mine owner to force a company into arbitration, if it is certain that no injury will arise from his operations. If the mine owner proceeds improperly in this respect, the company may, it seems, have an injunction.[7]

Brown *v.* Robins not applicable.

In any case arising under such Acts, the fact that the land would have subsided, even if in its natural state, does not entitle the surface owners to a remedy for the withdrawal of

[1] *Ante*, pp. 346 *et seq.*
[2] *Ante*, pp. 354 *et seq.*
[3] *Ante*, p. 363.
[4] 1895, A. C. 564.
[5] *Ante*, pp. 358, 359. See also New Moss Coll. Co. *v.* M. S. & L. R. Co., 1897, 1 Ch. 725.
[6] New Moss Coll. Co. *v.* M. S. & L. R. Co., *sup.*
[7] See Cromford Canal Co. *v.* Cutts, 5 Rail. Cas. 442, 456, 457.

the support. The principle of *Brown* v. *Robins* [1] does not apply.[2]

Enjoyment for twenty years immaterial.

And in no such case does the enjoyment of the support for twenty years entitle the surface owners to a continuance of the enjoyment without paying for it. In the face of the statutory provisions, it would be impossible to say that the enjoyment was as of right.[3]

Impossible to release statutory duty.

And in no such case does it seem possible for the surface owners to avoid paying for the right of support by saying, that they will not enforce the duty not to remove the support. Thus in *Chamber Colliery Co.* v. *Rochdale Canal Co.*,[4] the facts of which have been already partly stated,[5] the defendants offered to undertake to make no claim against the plaintiffs, in case the canal was damaged in consequence of the workings. The plaintiffs refused to accept this offer. The Court of Appeal considered that, having regard to the findings, and to the offer, the plaintiffs would not incur any liability for working within the pillars ; and upon this ground they decided in favour of the defendants.[6] Upon appeal to the House of Lords, it was contended that, if the plaintiffs were not entitled to work within the pillars, the defendants, being a statutory corporation, had no power to relieve them from their obligations in that respect, and that the undertaking would therefore have no binding force. As the decision was in favour of the defendants upon another ground, it was unnecessary to decide this question. Lords Herschell and Macnaghten, however, intimated that the view taken by the Court of Appeal as to the effect of the undertaking was at least open to serious question.[7] Lord Watson went further, and expressed disapproval of it.[8] And

[1] See *ante*, pp. 306, 307.

[2] Cf. the position under the Rail. & Wat. Cl. Acts, *post*, p. 388.

[3] See and consider Staffordshire, &c., Canal Co. *v.* Birmingham Canal Co., L. R. 1 H. L. 254, and cf. *ante*, p. 351. Most of the cases arising under special Railway and Canal Acts, might have been decided on the ground of an enjoyment for twenty years, if it had been tenable. In several of them the point was expressly raised : see, *e.g.*, N. E. R. Co. *v.* Elliot, 1 J. & H. 145, affirmed Elliot *v.* N. E. R. Co., 10 H. L. Cas. 333, *ante*, pp. 347, 348. Cf. cases arising under the Rail. & Wat. Cl. Acts, *post*, p. 388. As to an enjoyment for twenty years in ordinary cases, see *ante*, pp. 321—324.

[4] 1895, A. C. 564.

[5] *Ante*, pp. 358, 359.

[6] 1894, 2 Q. B. 632, *per* Lord Esher, and Kay and Smith, L.JJ.

[7] See 1895, A. C. 573, 574, 583.

[8] See p. 580.

there can be little doubt that, if it had been necessary, the House of Lords would have reversed the decision of the Court of Appeal.[1] The view, however, of the Court of Appeal has been acted on by a Court of first instance since *Chamber Colliery Co.* v. *Rochdale Canal Co.* was before the House of Lords.[2]

Compensation—when payable.

The money to be paid by a company purchasing under such Acts is not necessarily confined to the price of the land. If it is shown that the mines in question are about to be worked without delay, compensation in respect of them should be included. But, if the loss due to the prohibition upon the working cannot be estimated until a later period, the compensation cannot be claimed until the arrival of that period.[3]

Person to be compensated—measure of compensation.

A lessee is not disentitled to compensation merely because his reversioner has already been paid the value of the minerals *in situ*. The lessee is in addition entitled to the profit, which he might have made by selling them.[4]

Compensation—how recoverable.

A particular mode of recovering compensation is usually specified; and, when this is so, it may be that no other is available. For example, when an Act provided, that the question of compensation should be determined by an issue at law to be "tried before the Justice of Assize for the county in which the cause of action shall arise, by an action upon a feigned issue, to be commenced and prosecuted in one of Her Majesty's Courts of Record at Westminster," it was held, that the ordinary tribunals had no jurisdiction.[5] When, however, the remedy provided by the Act in question is no longer available, recourse may be had to the High Court.[6]

[1] It is difficult to see how the view of the Court of Appeal is consistent with Ayr Harbour Trustees *v.* Oswald, 8 A. C. 623, 634.

[2] See New Moss Coll. Co. *v.* M. S. & L. R. Co., 1897, 1 Ch. 725. The plaintiffs were in that case allowed an inquiry as to damages for the delay in working the subjacent coal: see p. 740.

[3] See Cromford Canal Co. *v.* Cutts, 5 Rail. Cas. 442; L. & Y. R. Co. *v.* Knowles, 20 Q. B. D. 403. Cf. the law under the Rail. & Wat. Cl. Acts, *post*, pp. 388 *et seq.*

[4] Barnsley Canal Co. *v.* Twibell, 7 Beav. 19. Affirmed 3 Rail. Cas. 471.

[5] See Fenton *v.* Trent, &c., Co., 9 M. & W. 203; Hanley, &c., Coal Co. *v.* North Staff. R. Co., W. N. 1891, p. 93: see also Evans *v.* M. S. & L. R. Co., 36 Ch. D. 626.

[6] See Bentley *v.* M. S. & L. R. Co., 1891, 3 Ch. 222.

(δ) No Right of Support and No Power to purchase it.

Metropolitan Board of Works *v.* Metropolitan Rail. Co.

In *Metropolitan Board of Works* v. *Metropolitan Railway Co.*[1] the plaintiffs made a sewer through some land under the powers of a Metropolitan Sewer Act. The defendants were the owners of land which laterally adjoined, and was not held under the same title. The defendants dug under their own land, and the sewer was in consequence injured. There were two features in the case, one of which distinguished it from all, and the other from several, of those mentioned in division (*a*) of the present subject:—(1) The sewer could have been constructed without the lateral support of the defendants' land; and (2) the Act contained no provision under which the defendants could claim compensation. It was held by a majority of the Exchequer Chamber, affirming a majority of the Court of Common Pleas, that the plaintiffs were without a remedy. And, with an explanation of the grounds on which the decision proceeded, it was approved in *Roderick* v. *Aston Local Board;*[2] in *In re Dudley;*[3] and in *London and North Western Railway Co.* v. *Evans.*[4] It will be observed, that in *Metropolitan Board of Works* v. *Metropolitan Railway Co.* there could not, under the principle already suggested,[5] have been an inherent right to compensation in respect of the liability to leave support, as the land through which the sewer was made and the defendants' land were held under different titles.

In re Dudley —Jary *v.* Barnsley Corporation.

In *In re Dudley*[6] it was doubted, whether the Act in question gave an implied right of general lateral support,[7] although it was held to give an implied right of subjacent support.[8] The doubt was due to grounds similar to those on which *Metropolitan Board of Works* v. *Metropolitan Railway Co.* was decided. In *Jary* v. *Barnsley Corporation,*[9] however, it was intimated, that the implied right probably extended to lateral, as well

[1] L. R. 3 C. P. 612; 4 *ib.* 192.
[2] 5 Ch. D. 332, 333.
[3] 8 Q. B. D. 90, 95, 96.
[4] 1893, 1 Ch. 24, 29, 33.
[5] See *ante*, pp. 352, 353.
[6] 8 Q. B. D. 86.
[7] See pp. 93—96.
[8] See *ante*, p. 349. It was held that this was not confined to the minerals lying mathematically beneath the sewers: see pp. 93—96. It is submitted, however, that anything not mathematically beneath adjoins laterally, not vertically.
[9] 1907, 2 Ch. 600; *ante*, p. 349.

as subjacent mines; and it is difficult to see why it should not.

There is frequently a difficulty in determining whether a particular Act ought to be placed under division (*a*) of the present subject, or under the present division; and, for the purpose of construing the Acts, general rules have been laid down to the following effect:—(1) Where an express statutory right is given to make and maintain something requiring support—especially where the thing to be made is one of public advantage and utility—the statute, in the absence of a controlling context, must be taken to mean that the right of support shall accompany the right to make and maintain. The powers of the Act might otherwise be inoperative. (2) If the Act contains provisions under which compensation can be given, it needs a strong context to show that the right of support is not also given. (3) If the Act does not provide any means of obtaining compensation, this is a strong argument against the legislature having intended to give the right of support.[1] If, however, the view already suggested [2] is correct, a distinction ought to be drawn between cases where the right of support is claimed against the original grantor or his successor in title, and cases where it is claimed against another person. In the former cases there is an inherent *primâ facie* right of compensation, which accrues at the same moment that the right of support accrues. In the former cases, therefore, the existence of provisions for compensation ought not to be a factor in determining whether there is a right of support. The second and third of the above propositions ought to be corrected accordingly. Rules of construction.

SECT. 4.—RAILWAYS CLAUSES CONSOLIDATION ACT, 1845, AND SIMILAR ACTS.

There are three public and general Acts, having a similar intention and policy, which stand upon a footing of their own with respect to support, and require a separate examination. The "code."

[1] See L. & N. W. R. Co. *v.* Evans, 1893, 1 Ch. 16. See also Clippens Oil Co. *v.* Edinburgh, &c., Trustees, 1904, A. C. 64. As to the presumption in favour of long-continued possession see *ante*, p. 351.

[2] *Ante*, pp. 352, 353.

These are the Rail. Cl. Cons. Act, 1845,[1] the Wat. Cl. Cons. Act, 1847,[2] and the Pub. Health Act, 1875 (Support of Sewers), Amendment Act, 1883.[3] In the case of Railway Acts incorporating the Rail. Cl. Act, the rights in respect of mines lying under or near the railways are regulated by sections 77 to 85 of that Act; and, in the case of Waterworks Acts incorporating the Wat. Cl. Act, the rights in respect of mines lying under or near the waterworks are regulated by sections 18 to 27 of the last-mentioned Act. The above sections constitute what is always called the "code." Section 6 of each of these Acts, although it does not deal specifically with mines, is also of importance upon the general question of compensation. The code under the Rail Cl. Act is for the most part (although not altogether) identical with that under the Wat. Cl. Act; and decisions upon the sections of one Act are to a corresponding degree authorities upon those of the other. The Pub. Health Am. Act, 1883, is an adaptation of the Wat. Cl. Act. There has also been a tendency in recent years to adapt sections 77 to 85 of the Rail. Cl. Act to other matters, with which it has no inherent relation.

Contracting out of "code."

Whether there is power to contract out of the "code" is a question which has been already considered.[4]

Arrangement of subject-matter.

It will be convenient to deal with the subject in the following order: (1) To set out *in extenso* the material provisions of the three principal Acts; (2) To consider together those of the two former Acts; including (*inter alia*) the principle of the code, its scope and limitations, and its machinery; (3) To consider those of the latter Act. The Local Government Act, 1894; the Small Holdings and Allotments Act, 1908; and the Housing and Town Planning, &c., Act, 1909, have incorporated sections 77 to 85 of the Rail. Cl. Act; and will be finally noticed.

a. The Provisions in extenso of the three principal Acts.

(*a*) *Sections* 6 *and* 77 *to* 85 *of Rail. Cl. Act.*

Rail. Cl. Act, s. 6.

Section 6 of the Rail. Cl. Act is headed by the words "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows:"—

[1] 8 & 9 Vict. c. 20.
[2] 10 & 11 Vict. c. 17.
[3] 46 & 47 Vict. c. 37.
[4] *Ante*, pp. 165–167.

And the following is the section itself :—

In exercising the power given to the company by the special Act to construct the railway and to take lands for that purpose the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise as regards such lands of the powers by this or the special Act or any Act incorporated therewith vested in the company; and, except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned Act shall be applicable to determining the amount of any such compensation and to enforcing the payment or other satisfaction thereof.

Sections 77 to 85 are headed by the words "And with respect to mines lying under or near the railway, be it enacted as follows :"— Rail. Cl Act, ss. 77–85.

And the following are the sections themselves :—

Section 77 :—The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased: and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. Company not to be entitled to minerals.

Section 78 :—If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines Mines lying near the railway not to be worked if the company willing to purchase them.

or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

If company unwilling to purchase, owner may work the mines.

Section 79:—If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, or, if the company shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any of the superior Courts.

Mining communications.

Section 80:—If the working of such any mines under the railway or works, or within the above-mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, and occupiers of such mines, and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work their said mines, but no such airway, headway, gateway, or water level shall be of greater dimensions or section than the prescribed dimensions and sections, and where no dimensions shall be described [*sic*] not greater than 8 ft. wide and 8 ft. high, nor shall the same be cut or made upon any part of the railway or works or so as to injure the same, or to impede the passage thereon.

Company to make compensation for injury done to mines.

Section 81:—The company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to lie on both sides of the railway all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier by reason of the severance of the lands lying over such mines by the railway, or of

the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway; and if any dispute or question shall arise between the company and such owner, lessee, or occupier as aforesaid, touching the amount of such losses or expenses, the same shall be settled by arbitration.

And also for any airway or other work made necessary by the railway.

Section 82:—If any loss or damage be sustained by the owner or occupier of the lands lying over any such mines the working whereof shall have been so prevented as aforesaid (and not being the owner, lessee, or occupier of such mines), by reason of the making of any such airway or other work as aforesaid, which or any like work would not have been necessary to be made but for the working of such mines having been so prevented as aforesaid, the company shall make full compensation to such owner or occupier of the surface lands for the loss or damage so sustained by him.

Power to company to enter and inspect the working of mines.

Section 83:—For better ascertaining whether any such mines are being worked or have been worked so as to damage the railway or works, it shall be lawful for the company, after giving twenty-four hours' notice in writing, to enter upon any lands through or near which the railway passes wherein any such mines are being worked or are supposed so to be, and to enter into and return from any such mines or the works connected therewith; and for that purpose it shall be lawful for them to make use of any apparatus or machinery belonging to the owner, lessee, or occupier of such mines, and to use all necessary means for discovering the distance from the railway to the parts of such mines which are being worked or about so to be.

Penalty for refusal to allow inspection.

Section 84:—If any such owner, lessee, or occupier of any such mine shall refuse to allow any person appointed by the company for that purpose to enter into and inspect any such mines or works in manner aforesaid, every person so offending shall for every such refusal forfeit to the company a sum not exceeding 20*l*.

If mines improperly worked the company may require means to be adopted for the safety of the railway.

Section 85:—If it appear that any such mines have been worked contrary to the provisions of this or the special Act, the company may, if they think fit, give notice to the owner, lessee, or occupier thereof to construct such works and to adopt such means as may be necessary or proper for making safe the railway, and preventing injury thereto; and if after such notice any such owner, lessee, or occupier do not forthwith proceed to construct the works necessary for making safe the railway, the company may themselves construct such works, and recover the expense thereof from such owner, lessee, or occupier, by action in any of the superior Courts.

(β) *Sections* 6 *and* 18 *to* 27 *of Wat. Cl. Act.*

Wat. Cl. Act, s. 6.

Section 6 of the Wat. Cl. Act is headed by the words, "And with respect to the construction of the waterworks, be it enacted as follows:"—

And the following is the section itself:—

> Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Cl. Cons. Act, 1845, and if the waterworks be situated in Scotland, the provisions and restrictions contained in the Lands Cl. Cons. (Scotland) Act, 1845; and shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act or any Act incorporated therewith; and, except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the said Lands Cl. Cons. Acts respectively for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the last-mentioned Acts respectively shall be applicable to determine the amount of any such compensation, and to enforce payment or other satisfaction thereof.

Wat. Cl. Act, ss. 18–27.

Sections 18 to 27 are headed by the words "And with respect to mines be it enacted as follows:"—

And the following are the sections themselves:—

Undertakers not entitled to mines, unless expressly purchased.

Section 18:—The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of

the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

Map and plan of underground works to be made, and corrected from time to time.

Section 19 :—The undertakers shall from time to time, within six months from the time at which any pipes, conduits, or underground works shall have been laid down or formed by them, cause a survey and map to be made of the district within which any such pipes or underground works shall be laid, on a scale not less than one foot to a mile, and shall cause to be marked thereon the course and situation of all existing pipes or conduits for the collection, passage, or distribution of water and underground works belonging to them, in order to show all such underground works within the said district, and shall, within six months from the making of any alterations or additions, cause the said map to be from time to time corrected, and such additions made thereto as may show the line and situation of all such pipes, conduits, and underground works as may be laid down or formed by them from time to time after the passing of the special Act ; and such map and plan, or a copy thereof, with the date expressed thereon of the last time when the same shall have been so corrected as aforesaid, shall be kept in the office of the undertakers, and shall be open to the inspection of all persons interested in the same within the said district.

Copies of such map or plan to be deposited with clerk of the peace, &c.

Section 20 :—The undertakers shall from time to time, within three months from the time at which any such map or plan, or any such correction thereof or addition thereto, shall have been made as aforesaid, deposit with the clerks of the peace in England or Ireland, and with the sheriff clerks in Scotland, of every county, and the town clerk of every burgh in Scotland, in which such district or any part thereof may be situate, and also with the parish clerks of the several parishes in England, and clerks of the union of the several parishes in Ireland, and the schoolmasters of the several parishes in Scotland, in which such underground works shall be situate, copies of the said map or plan, with all such particulars and all such corrections and additions as aforesaid, so far as relates to such counties, burghs, and parishes respectively.

Clerks of the peace, &c., to receive and keep copies of the map, &c., and allow inspection.

Section 21 :—The said clerks of the peace, sheriff clerks, and town clerks, parish clerks, clerks of the union, and schoolmasters shall receive the said copies of the said map and plan respectively, and shall keep the same, and shall allow all persons interested to inspect the same, and take copies or extracts of and from the same, in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of maps and plans deposited under the Parliamentary Documents Deposit Act, 1837.

7 Will. 4 & 1 Vict. c. 83.

As to working of mines

Section 22 :—Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or

lying near the works.

occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be underground, and shall be described in the map or plan which shall be so kept and deposited as hereinbefore mentioned, or within the prescribed distance, if any, and if no distance be prescribed within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owner do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation.

If undertakers do not state their willingness to treat for payment of compensation, owner may work the mines.

Section 23:—If before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, and to drain the same, by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner; and if any damage or obstruction be occasioned to the works of the undertakers by the working of such mines in an unusual manner the same shall be forthwith repaired or removed (as the case may require), and such damage made good by the owner, lessee, or occupier of such mines or minerals, and at his own expense, and if such repair or removal be not forthwith done, or if the undertakers shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the undertakers to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any of the superior Courts.

Owners to make good damage occasioned by working the mines in an unusual manner.

Mining communications.

Section 24:—If the working of any such mines under the said works of the undertakers or within the above-mentioned distance therefrom be prevented as aforesaid by reason of apprehended injury to such works, it shall be lawful for the respective owners, lessees, and occupiers of such mines to cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata, the working whereof shall be so prevented as may be requisite to enable them to ventilate, drain, and work any mines or minerals on each or either side thereof, but no such airway, headway,

gateway, or water level shall be of greater dimensions or sections than the prescribed dimensions or sections, and where no dimensions are prescribed, 8 ft. wide and 8 ft. high, nor shall the same be cut or made upon any part of the said works so as to injure the same.

Undertakers to make compensation to owner, lessee or occupier of mines for expenses incurred by severance of mines, or by interruptions of or restrictions on works, and for minerals not obtained.

Section 25 :—Except where otherwise provided for by agreement the undertakers shall from time to time pay to the owner, lessee, or occupier of any mines of coal, ironstone, and other minerals, extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, or other works, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier by reason of the severance of the lands over such mines or minerals, by such reservoirs or other works, or of the continuous working of such mines or minerals being interrupted as aforesaid, or by reason of the same being worked under the restrictions contained in this or the special Act; and for any mines or minerals, not purchased by the undertakers, which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid; and if any dispute or question shall arise between the undertakers and such owner, lessee, or occupier, as aforesaid, touching the price of such materials, the same shall be settled by arbitration in such manner as is provided by the Lands Cl. Cons. Act if the undertaking shall be situate in England or Ireland, and by the Lands Cl. Cons. (Scotland) Act if the undertaking shall be situate in Scotland.

Disputes to be settled by arbitration.

Power to undertakers to enter and inspect the working of mines after giving notice of the same.

Section 26 :—For better ascertaining whether any such mines are being worked or have been worked so as to damage the said works, it shall be lawful for the undertakers, after giving twenty-four hours' notice in writing, to enter upon any lands through or near which the said works are situate, and wherein any such mines are being worked or are supposed so to be, and to enter into and return from any such mines or the works connected therewith, and for that purpose it shall be lawful for them to make use of any apparatus or machinery belonging to the owner, lessee, or occupier of such mines, and to use all necessary means for discovering the distance from the said works to the parts of such mines which are being worked or about to be worked.

Nothing to prevent undertakers from being liable to actions for injury done to mines.

Section 27 :—Nothing in this or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this Act or the special Act.

(γ) *Pub. Health Am. Act*, 1883.

Short title and construction.

1. This Act may be cited as the Pub. Health Act, 1875 (Support of Sewers), Amendment Act, 1883, and shall be construed as one with

the Pub. Health Act, 1875 (in this Act called the principal Act), as amended by the Acts for the time being in force amending the same.

2. In this Act :—

Interpretation.

The expression "sanitary work" means any existing or future building or work constructed by or vested in or under the control of a local authority, under the powers or for the purposes of so much of the principal Act or of any general or local Act or Provisional Order as relates to the construction or maintenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and includes any fixtures, pipes, fittings, or apparatus connected with any such work, and belonging to or used by the local authority.

The expression "support" includes vertical and lateral support.

The expression "sanitary Act" means the Act or Provisional Order under the authority of which a sanitary work has been or is constructed or is maintained, whether such Act or order was passed and confirmed before or after the commencement of this Act.

The expression "person" includes a body corporate.

Application of provisions of the Wat. Cl. Act, 1847, 10 & 11 Vict. c. 17, with respect to mines, to sanitary works over mines.

3. The provisions of the Wat. Cl. Act, 1847, sections 18 to 27 [1] (both inclusive), with respect to mines shall in relation to any sanitary work of a local authority be deemed to be incorporated with this Act, and with the sanitary Act under the authority of which such sanitary work has been or is constructed or is maintained, with the following modifications (that is to say) :—

(1) For the purposes of such incorporation the said provisions of the Wat. Cl. Act, 1847, shall be construed as if the expression "the undertakers" referred to the local authority, and as if the expression "the special Act" referred to such sanitary Act and this Act, and as if expressions relating to pipes, conduits, or other works referred to the sanitary work.

(2) The local authority, by or with any notice under the Wat. Cl. Act, 1847, of willingness to treat for or make compensation, or of intention to prevent or interfere with the working of any mines, may specify and define the nature and extent of support which they require to be left, and any such notice may extend to minerals beyond the distance of forty yards mentioned in the said Act, or to such less distance as the local authority think fit.

(3) As regards sanitary works existing at the passing of this Act, the local authority shall cause the survey and map referred to in section 19 of the Wat. Cl. Act, 1847, to be made within twelve months after the passing of this Act.

(4) The amount of any compensation in respect of support for a sanitary work payable by a local authority under the provisions of the Wat. Cl. Act, 1847, as incorporated with this Act or the sanitary

[1] *Ante*, pp. 338—341.

Act, together with the costs of and incident to settling the same by arbitration or otherwise, shall be paid, charged, and borne in the same manner, and subject to the same powers and provisions as to borrowing and otherwise as is provided with respect to the expenses of the construction or maintenance of the sanitary work by the sanitary Act.

(5) A local authority may from time to time make agreements with the owners, lessees, or occupiers of or the persons working any mine for compromising any claim made or to be made in respect of anything done or omitted before the passing of this Act in relation to the matters in this Act mentioned, or otherwise for carrying into effect the purposes of this Act in relation to the past or future working of mines.

The provisions of this Act shall apply to every sanitary work as defined in this Act, whether the land on, in, over, or under which such work is situate is or is not vested in or occupied by the local authority, and is or is not wholly or partially dedicated to the public as a street, highway, or public place.

Limitation of right to support for sanitary works over mines.

4. Except as in this Act provided a local authority shall not by reason only of anything contained in the sanitary Act, under the authority of which a sanitary work has been or is constructed or maintained, be deemed to have acquired or to be entitled to or to be bound to acquire or make compensation for any right of support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine, and nothing in such sanitary Act shall be deemed to have subjected or to subject any such person to any liability to the local authority in respect of damage to a sanitary work caused in or consequent upon the working of any mines in a reasonable and proper manner.

Savings.

5. Nothing in this Act shall be construed to repeal, invalidate, or affect any express enactment in a sanitary or other Act with respect to rights of support for sanitary works or any agreement made before the passing of this Act with respect to such rights, or to affect any action, arbitration, or other legal proceeding concluded before or pending at the passing of the Act. Where any right of support has been acquired before the passing of this Act by a local authority in respect of any sanitary work, and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired, or operate to deprive the local authority of such right or to entitle any person to any compensation in respect thereof, to which such person would not have been entitled if this Act had not been passed.

b. Principle of the Code—Deferred Rights.

(*a*) *No Right of Support ab initio.*

Dicta as to effect of s. 77 of Rail. Cl. Act and s. 18 of Wat. Cl. Act.

There is a curious difference of opinion as to the probable effect which section 77 of the Rail. Cl. Act, or section 18 of the Wat. Cl. Act, would have, if it stood alone. In *Great Western Railway Co.* v. *Bennett* [1] Lord Westbury said :—" In the face of these words " (section 77) " there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." [2] On the other hand, in *Dixon* v. *Caledonian, &c., Co.*[3] Lord Selborne, speaking of the corresponding sections of the Scotch Act, said :—" The first clause, section 70, says, that an ordinary conveyance of land for the purposes of the railway shall not be held to carry with it to the railway company a right to subjacent mines and minerals unless the same shall have been expressly purchased. I need not more particularly refer to that, and I will only add that, as I understand that clause and the next, there would be nothing in those sections, if they stood alone, to deprive a railway company purchasing the surface from the owner of the land of the ordinary right to support from the subjacent strata, though those subjacent strata were reserved and excepted in favour of the landowner." [4] The last clause [5] " is a clause which has the most important office of taking away that right to support, which, if there had been nothing said in that section, would have remained." [6] Lord Blackburn agreed : " The effect of that, if it had stood alone, would no doubt, by implication, although it is not expressly said, have been that the mine owner would have been entitled to work his mines just as if anybody else owned the surface instead of the railway company, and would have been under the same obligations, neither more nor less, to support the surface." [7] In *Pountney* v. *Clayton* [8] Lord Esher expressed an inclination to agree with Lord Westbury ; [9] but

[1] L. R. 2 H. L. 27.
[2] *Ib.*, p. 41.
[3] 5 A. C. 820.
[4] *Ib.*, p. 829.
[5] S. 72.
[6] S. A. C.. 831.
[7] *Ib.*, p. 834.
[8] 11 Q. B. D. 820.
[9] *Ib.*, p. 834.

in the same case Manisty, J., took the same view as Lord Selborne, and Bowen, L.J., referred to Lord Selborne's observations, and expressed agreement therewith.[1] In *Ruabon Brick, &c., Co.* v. *Great Western Railway Co.*,[2] Lindley, L.J., speaking of section 77, said :—"This probably would not have any further effect than the ordinary exception of mines from a grant;" [3] and in the same case Bowen, L.J., took the same view, and repeated his agreement with Lord Selborne.[4] In *Manchester Corporation* v. *New Moss Colliery*,[5] Farwell, J., speaking of section 18, said : "I cannot regard the section as a mere conveyancing section, intended solely for the purpose of altering the construction of deeds in the case of railway and waterworks undertakings, and therefore of no application in cases where the mines are bought and conveyed. Either by itself or in conjunction with the following clauses, where the mines are not purchased, it has the effect of depriving the undertakers of all right to support from the excepted mines, a right which would otherwise be implied, as the sale is for the purpose of the undertaking." Finally, in *L. & N. W. R. Co.* v. *Howley Park, &c., Co.*,[6] Hardy, M.R., and Moulton, L.J., said that section 77 was a mere "rule of construction." [7]

General intention of code as a whole.

There has, however, been no difference of opinion as to the general intention of the code taken as a whole. Railway or waterworks proprietors were not, in the first instance, in purchasing the land to be obliged to make compensation in respect of the subjacent or lateral mines. They were to be at liberty, if they thought that an immediate working was not possible, or was not contemplated, to postpone making such compensation until the necessity arose.[8]

[1] 11 Q. B. D., pp. 829, 830, 841.
[2] 1893, 1 Ch. 427.
[3] *Ib.*, p. 453.
[4] *Ib.*, pp. 456, 457.
[5] 1906, 1 Ch. 294.
[6] 1911, 2 Ch. 97.
[7] *Ib.*, pp. 109, 112.
[8] As to railways, see Fletcher *v.* G. W. R. Co., 4 H. & N. 252, 253, *per* Martin and Watson, BB.; G. W. R. Co. *v.* Fletcher, 5 *ib.* 698, 699, *per* Cockburn, C.J.; L. & N. W. R. Co. *v.* Ackroyd, 31 L. J. Ch. 590, *per* Wood, V.-C.; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 40, 42, *per* Lords Chelmsford, Cranworth, and Westbury; Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 266; Smith *v.* G. W. R. Co., 3 A. C. 175, *per* Lord Cairns; Hooper *v.* Bourne, 5 *ib.* 24; Dixon *v.* Cal., &c., Companies, 5 *ib.* 831, 832, 834, 835, 838, 839, *per* Lords Selborne, Blackburn, and Watson; Errington *v.* Met. R. Co., 19 Ch. D. 570, 579, *per* Jessel, M.R., and Holker, L.J.; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 556, 558, *per* Kay, J.; Pountney *v.* Clayton, 11 Q. B. D

Dicta in G. W. Rail. Co. *v.* Bennett.

"This section [1] appears to me to leave the mine owner to work his mines exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him compensation. . . . The mine owner, therefore, may work his mines in a manner beneficial to himself, in order to win the largest quantity of minerals that the mine will yield." [2] "The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and, if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered, nothing but the surface. That being so, justice obviously requires that, when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the purpose of the railway, the company was to take (and it was a very beneficial provision for the company) that, and

830, 831, 832, *per* Manisty, J., 835, 842, *per* Brett, M.R., and Bowen, L.J.; Mid. R. Co. *v.* Miles, 30 Ch. D. 638, *per* Pearson, J., 33 Ch. D. 646, *per* Stirling, J.; Glasgow *v.* Farie, 13 A. C. 671, 675, 676, 682—685, 696, *per* Lords Halsbury, Watson, Herschell, and Macnaghten; Mid. R. Co. *v.* Robinson, 37 Ch. D. 395, *per* Cotton, L.J., 404, *per* Lindley, L.J., 15 A. C. 27, 28, *per* Lord Herschell; Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 328, *per* Smith, J.; Jersey *v.* Neath Poor Law Union, *ib.* 557, 562, 564, 565, *per* Lord Esher, and Bowen and Fry, L.JJ.; Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 453, 454, 457, 459, 460, 464, *per* Lindley, Bowen, and Smith, L.JJ.; *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 464, 471, *per* Lord Esher and Rigby, L.J.; G. W. R. Co. *v.* Blades, 1901, 2 Ch. 630, *per* Buckley, J.; Eden *v.* N. E. R. Co., 1907, A. C. 407, *per* Lord Macnaghten; Rugby, &c., Co. *v.* L. & N. W. R. Co., 1908, 2 K. B. 618, *per* Farwell, L.J.; G. W. R. Co. *v.* Carpalla, &c., Co., 1909, 1 Ch. 230, *per* Moulton, L.J.; 235, 236, *per* Farwell, L.J.; N. B. R. Co. *v.* Budhill, &c., 1910, A. C. 126, *per* Lord Loreburn; 129, 130, *per* Lord Gorell; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 114, 115, *per* Moulton, L.J., 129, *per* Buckley, L.J. As to waterworks, see South Staffordshire Co. *v.* Mason, 56 L. J. Q. B. 256, *per* Wills, J.; Consett Wat. Co. *v.* Ritson, *sup.*; Holliday *v.* Wakefield, 1891, A. C. 91, 102; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 291—293; New Moss Colliery *v.* Manchester Corporation, 1909, A. C. 121, 124.

[1] S. 78 of the Rail. Cl. Act.

[2] G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 39, *per* Lord Chelmsford.

that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with whenever the time for working the mine should arrive." [1] "One is astonished that any argument could have been raised upon the ordinary implication applicable to a grant, which is so entirely excluded by the express enactment of the statute." [2]

Dicta in Ruabon Brick, &c., Co. *v.* G. W. Rail. Co.

"As regards mines, the railway company have nothing to do with them until the time comes when the owner wants to work them so as to endanger the railway. It may never come at all. They may be minerals which cannot be worked at a profit, or so situate as not to be worth working, and in such a case the railway company get the right of support for ever for nothing." [3] "What, then, does section 79 do in favour of the mine owner? It certainly takes away rights of adjacent and subjacent support to some extent from and after a particular moment. If the mine owner wants his mines and is desirous of working them, then the occasion arises; and if the railway company, upon notice, are unwilling to purchase them, then he may, so far as is necessary for the enjoyment of his own mine, destroy the adjacent and subjacent support. In the case of an underground mine, you may let down the surface from and after that moment; up to that moment the railway company are not threatened, and they enjoy the benefit of the adjacent and subjacent support. It is not perfectly correct to say that under the Act the railway company get no right to adjacent and subjacent support; they get every right to adjacent and subjacent support, it seems to me, which they want, except so far as the mine owner at any particular moment requires to utilise his mines." [4]

Dicta in *In re* Gerard and L. & N. W. Rail. Co.

"The intention was to give the owner of mines under a railway rights which he would not otherwise have possessed

[1] Pp. 40, 41, *per* Lord Cranworth.

[2] P. 42, *per* Lord Westbury: see also Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 326, 327; Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 453, 459, 460, 463, 464; *In re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 469. See also the other cases cited *ante*, p. 381, n. [8].

[3] Ruabon Brick, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 454, *per* Lindley, L.J.

[4] P. 457, *per* Bowen, L.J.: see also p. 460. See also G. W. R. Co. *v.* Blades, 1901, 2 Ch. 630, 631, *per* Buckley, J.; Rugby, &c., Co. *v.* L. & N. W. R. Co., 1908, 2 K. B. 618, 619, *per* Farwell, L.J.; N. B. R. Co. *v.* Budhill, &c., 1910, A. C. 126, 138, *per* Lords Loreburn and Shaw.

in return for common law rights of which he was deprived. Take the case of the owner of minerals not beneath, but within forty yards from, the railway. . . . The owner of such minerals is prevented from working them without giving notice to the company, and giving them the opportunity of compensating him for not working those minerals. He is therefore deprived of a valuable right. The circumstances might be such, and the railway might at the particular spot be so constructed, that the lateral support of the minerals might not be necessary. In that case, at common law, the owner of the mine could work the minerals right up to the railway; and, even if lateral support were required, the mine owner might work the minerals provided he supplied that support by artificial means,[1] and the railway company could not object. Therefore the mine owner is placed by the Act under obligations and liabilities which would not exist at common law, and in return he is to get the benefit of these clauses." [2]

Dicta in L. & N. W. Rail. Co. *v.* Howley Park, &c., Co

"The rights given by section 78 to the railway company are in substitution for the common law rights of support, whether vertical or lateral, within the 40 yards' limit." [3] "Their general effect is, in my opinion, to establish on a statutory basis the reciprocal rights of the railway company, on the one hand, and the owners, lessees or occupiers (whom for brevity's sake I shall hereafter refer to as the owners) of mines lying under or near the railway on the other. These reciprocal rights are different from, and inconsistent with, the common law right of vertical and lateral support, and entirely replace those rights as between the railway company and the owners of the mines, so that on the one hand the railway company cannot claim those common law rights as against the mine owners, nor can the owners of the mines claim that freedom of working which is compatible with the duties of support, and is, therefore, permitted by the common law. In return for this novel servitude imposed upon them by the legislature, the owners of such mines have sundry rights and privileges granted to them. These rights and privileges are given to them by statute and

[1] As to this, see *ante*, p. 290.

[2] *In re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 470, 471, *per* Rigby, L.J.

[3] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 109, 110, *per* Hardy, M.R.

not by contract, and they are unaffected by any transactions between the railway company and third parties. The area throughout which these relationships obtain becomes, therefore, a realm in which we have only to look to the statute to determine the rights and burdens of the two parties, or either of them. These new rights of the railway company, when taken together, with the provisions as to the correlative rights of the mine owners, are so wholly incompatible with the common law rights of support from subjacent and adjacent strata, that one is driven to the conclusion that, as between the railway company on the one hand, and the mine owner on the other, the common law rights and obligations must be deemed to be taken away entirely so far as the mines are concerned. This doctrine has now been recognised by the Courts, and I cannot see how they could have come to any other conclusion without involving the whole subject in a hopeless tangle of conflicting rights and obligations. The conclusion that the right of support from those mines is gone (which is now settled law, having been repeatedly affirmed by the Courts) is not based on any express language taking it away, but on the statutory provision of rights and obligations between the railway company and owners of mines within the prescribed area which are incompatible with its existence." [1]

"In my opinion sections 77 to 85 of the Act not only do not disturb, but, on the contrary, by inference affirm, the continuing application of the ordinary common law right of support; but in certain events, supersede it, and replace it by what has been called the code. Until the mineral owner has given his notice, and the 30 days have expired, the railway company enjoys, in fact, I think I may say enjoys as of right, such support as the minerals in fact give. By payment of money it can preserve to itself the right to this support. If the company is not prepared to pay money, there comes into existence for the first time a right to let down the surface, created in the mineral owner by section 79. After the purchase of the surface by the railway company, the mineral owner has not a right, but only a contingent right, to let down the surface. The contingency is that, after notice, the company does not pay compensation. Section 79 may be described as a defeasance upon

[1] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. pp. 114, 115, 120, *per* Moulton, L.J.

the right to support. In an event, the mineral owner may defeat a right to support which, but for that event, exists in the railway company." [1]

No implied grant.

The result is this:—Cases like *Caledonian Railway Co.* v. *Sprot,*[2] and *Elliot* v. *North Eastern Railway Co.;* [3] and, *à fortiori,* cases arising under instruments *inter partes,*[4] or Inclosure Acts; [5] turning, as they all did, upon the doctrine of implied grant, have no application. Cases, on the other hand, like those mentioned in division (β) of section 3 of the present subject,[6] in which the doctrine of implied grant was excluded, have a close application.

G. W. Rail. Co. *v.* Bennett.

One of the first cases, and the leading case, in which the principle of the code was applied was *Great Western Railway Co.* v. *Bennett.*[7] There the predecessors in title of the Great Western Railway Co. purchased land under the powers of an Act which incorporated the Rail. Cl. Act. The defendant acquired the excepted mines and minerals, and gave the company notice of his intention to work. The amount of compensation having been referred to arbitration, it was determined, that, if the defendant was entitled to work out all the minerals, he was entitled to receive 8,649*l.* 10*s.*; but that, if he was bound to leave reasonable support for the surface, he was only entitled to receive 1,085*l.* 3*s.* 8*d.* An action having been brought upon this award, it was decided by the House of Lords, that the defendant was entitled to work out all the minerals, and was under no obligation to leave support for the surface. This case approved and followed *Fletcher* v. *Great Western Railway Co.,*[8] where the circumstances were similar.[9]

Difference between Acts.

There is a great general similarity between the Acts as regards the code. But there are also differences; some merely verbal, others difficult (if not impossible) to explain,

[1] P. 129, *per* Buckley, L.J.

[2] *Ante,* pp. 346, 347.

[3] *Ante,* pp. 347, 348.

[4] *Ante,* pp. 326 *et seq.*: see Mid. R. Co. *v.* Miles, 30 Ch. D. 638, *per* Pearson, J.

[5] *Ante,* pp. 326 *et seq.*: see Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 452, 453, *per* Lindley, L.J.

[6] *Ante,* pp. 354 *et seq.*

[7] L. R. 2 H. L. 27.

[8] 4 H. & N. 242; affirmed nom. G. W. R. Co. *v.* Fletcher, 5 *ib.* 689.

[9] See also L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at 122, 123; and see the other cases cited *ante,* p. 381, n. [8].

and the remainder based on corresponding differences in the subject-matter.

Ss. 78 & 81 of Rail. Cl. Act—ss. 22 & 25 of Wat. Cl. Act.

There is a difference between sections 78 and 81 of the Rail. Cl. Act, and the corresponding sections (sections 22 and 25) of the Wat. Cl. Act. The former sections do not in terms reserve power to the parties to contract out of the code. The latter sections do. And it has been said in the Court of Appeal that railway companies have no power so to contract.[1] For reasons already stated,[2] it is suggested that this view cannot be supported.

S. 79 of Rail. Cl. Act—s. 23 of Wat. Cl. Act.

There are also differences between section 79 of the Rail. Cl. Act, and the corresponding section (section 23) of the Wat. Cl. Act. The latter section reserves power to the mine owner, in the absence of a counter-notice by the waterworks company, to work "as if this Act and the special Act had not been passed." Having regard to these words, it has been decided, that, in the absence of a counter-notice, the parties are remitted to their common law position.[3] Section 79 of the Rail. Cl. Act reserves power to work in a similar event, but without any similar qualifying words. The question is, What, having regard to the absence of such words, is the position of railway companies? This question is subsequently considered.[4] Section 79 of the Rail. Cl. Act also provides, that, if the mine owner works, he shall do so in a manner "proper and necessary" for the beneficial working, and according to the "usual" manner of working in the district. Section 23 of the Wat. Cl. Act provides that, if the mine owner works, no wilful damage shall be done, and the working shall not be in an "unusual manner."[5] It has been held, that the burden of showing compliance with section 79 is on the mine owners, and that the burden of showing a breach of section 23 is on the undertakers.[6]

S. 82 of Rail. Cl. Act, ss. 19, 20, 21 & 27 of Wat. Cl. Act.

Section 82[7] of the Rail. Cl. Act has no counterpart in the Wat. Cl. Act. And, from the nature of the case, sections 19,

[1] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 124—126, *per* Moulton, L.J.

[2] See *ante*, pp. 165—167.

[3] See *post*, pp. 396 *et seq.*, 421—424.

[4] See *post*, pp. 399 *et seq.*

[5] There are also differences between the wording of sect. 79 of the Rail. Cl. Act, and the corresponding section of the Scotch Act.

[6] See Edinburgh Trustees *v.* Clippens Oil Co., 25 R. 504: see pp. 515—516.

[7] See *post*, p. 373.

20, and 21 of the Wat. Cl. Act, as to the deposit of plans of underground works of waterworks proprietors; and section 27 of the same Act, as to injury caused by water to the mines; have no counterpart in the Rail. Cl. Act.

Application of Brown *v.* Robins.

Except so far as the common law position may not have been altered (as in the case of non-"minerals" inside the prescribed distance,[1] and of "minerals" and non-"minerals" outside it [2]); or as the parties may be remitted to their common law position (as where a counter-notice has not been given under the Wat. Cl. Act; [3] it is, under the code, immaterial that the surface would have subsided if it had been left in its natural state.[4] The principle of *Brown* v. *Robins* [5] does not otherwise apply.

Effect of enjoyment for twenty years.

And, except in the cases above mentioned, the fact that the support has been enjoyed for twenty years is also immaterial.[6] In the face of the code it would, except in the cases above mentioned, be impossible to say that the enjoyment was as of right.[7]

Deposit of plans.

Before waterworks proprietors can entitle themselves to the benefit of the code, they must comply with the obligations which it imposes. The deposit of plans of their underground works, pursuant to sections 19 and 20 of the Wat. Cl. Act,[8] is a condition precedent to the right of a company incorporated under that Act to recover for injuries caused to their pipes by the ordinary and usual workings of a mine.[9]

(β) *Compensation Enactments—Deferred Right.*

Compensation enactments.

The enactments of the code under which compensation can be claimed are sections 78, 79, and 81 of the Rail. Cl. Act, and sections 22, 23, and 25 of the Wat. Cl. Act. These are not,

[1] See *post*, pp. 395, 424, 425.

[2] See *post*, pp. 395, 425—427.

[3] See *post*, pp. 396 *et seq.*

[4] The point was taken, but without success, in Fletcher *v.* G. W. R. Co., 4 H. & N. 242 (see p. 247), affirmed nom. G. W. R. Co. *v.* Fletcher, 5 *ib.* 689; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 27; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 278. Cf. the cases arising under special Railway and Canal Acts, *ante*, pp. 365, 366.

[5] See *ante*, pp. 306, 307.

[6] See Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 278, 290.

[7] Cf. cases arising under special Railway and Canal Acts, *ante*, p. 366.

[8] See *ante*, pp. 375.

[9] South Staffordshire, &c., Co. *v* Mason, 56 L. J. Q. B. 255.

however, the only enactments in the Acts under which compensation [1] can be claimed. It may also be claimed under section 6 of each Act; the word "lands" in that section including mines.[2]

Generally.

In considering the position as to support, the corresponding position as to compensation has been partly considered. There is under the code no right of support *ab initio*; and, *e converso*, the right to receive compensation is, in the great majority of cases, a deferred right.[3] Speaking generally, the basis of the code is the principle of deferred rights on both sides.

Not generally payable at time of purchase.

If compensation could be generally obtained at the time of the purchase of the land, the object of the code would be defeated; and, apart from this, the difficulty of measuring the compensation would be extreme.[4] "I think I may say, that it is unheard of that compensation for any loss of facilities for getting minerals should be asked for at the time of the purchase of the land." [5] Such compensation was, notwithstanding these observations, asked for in *In re Gerard and L. & N. W. Railway Co.*,[6] but without success.

When subsequently payable.

The question that usually arises is, At what time subsequent to the purchase of the land can the compensation be claimed? When the period has arrived "when, in the ordinary course of the underground workings of the owner, they are approached so nearly as to be immediately worked if the workings proceed," the compensation can be claimed.[7]

Injurious affection, &c. Holliday *v.* Wakefield.

In *Holliday* v. *Wakefield*,[8] a special Act, incorporating the Wat. Cl. Act, empowered the making of a reservoir in land containing coal mines. The undertakers having given the

[1] *Ante*, pp. 371, 374.

[2] Smith *v.* G. W. R. Co., 3 A. C. 165; Holliday *v.* Wakefield, 1891, A. C. 81.

[3] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 130, *per* Buckley, L.J., contrasting the position outside the prescribed distance, where the claim arises at once: see *post*, pp. 426, 427.

[4] See Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. pp. 458, 460, *per* Bowen, L.J.

[5] *Ib.* 460, *per* Bowen, L.J. It is submitted, that this is laid down too broadly: cf. Cromford Canal Co. *v.* Cutts and L. & Y. R. Co. *v.* Knowles, cited *ante*, p. 367.

[6] 1894, 2 Q. B. 915; 1895, 1 Q. B. 459.

[7] See Dixon *v.* Cal., &c., Companies, 5 A. C. at p. 839, *per* Lord Watson: see also Mid. R. Co. *v.* Robinson, 15 *ib.* 32; Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 465. Cf. the law in cases like Cromford Canal Co. *v.* Cutts and L. & Y. R. Co. *v.* Knowles, *ante*, p. 367.

[8] 1891, A. C. 81.

mine owners notice to treat for part of the coal, the mine owners claimed compensation for injurious affection of and prospective damage to the remainder of the coal. The arbitrator found as facts :—(1) that the workings had not as yet approached the reservoir, so as to cause any present risk to the mines from the existence of the reservoir ; (2) that, if the mine owners were free to work without risk of interruption from the undertakers' works, they could and would have got the whole of certain coal under the reservoir and within forty yards of the boundary ; (3) that, if the undertakers purchased the coal which they had given notice to take, and no other coal, the mine owners, by reason of the undertakers' works, and of apprehension of injury therefrom, could not get more than 50 per cent. of the coal under the reservoir or within twenty yards of its boundary ; and (4) that a prudent lessee working without right to compensation would be compelled, by reason of such apprehension of injury, to abstain from working more than such 50 per cent. It was contended, that the words " or by reason of such apprehended injury from the working thereof as aforesaid," which occur in section 25 of the Wat. Cl. Act, and are peculiar to that Act,[1] referred to the not being able to work ; and that the mine owners were accordingly entitled to claim compensation for the prospective " prevention of the working " of more than such 50 per cent. It was held by a majority of the House of Lords,[2] that these words were used in reference to the earlier sections, and meant injury apprehended by the undertakers ; and it was unanimously held, that the mine owners were not entitled under sections 22, 23, and 25 of the Act to the compensation claimed by them.[3] A contrary decision would have withdrawn from the undertakers the right of determining what mines should be worked, and what should be left for support ; and would moreover have compelled payment at once, on the basis that workings would be interfered with, which might never be undertaken.[4]

[1] See s. 25, cited *ante*, p. 377. There are no similar words in s. 81 of Rail. Cl. Act, which is cited *ante*, pp. 372, 373.

[2] Agreeing with Fry, L.J., in 20 Q. B. D. 717. It does not seem clear that Lord Herschell shared this view : see 1891, A. C. 105.

[3] Affirming the decision of the Court of Appeal, 20 Q. B. D. 699.

[4] See 1891, A. C. 89, 104, *per* Lords Bramwell and Herschell. Cf. Whitehouse *v.* Wolverhampton R. Co., L. R.

A similar decision as to the Rail. Cl. Act was come to in *In re Gerard and London & North Western Railway Co.*[1] *In re* Gerard and L. & N. W. Rail. Co.

And in such cases it cannot be said that the owner has been "injuriously affected," so as to enable him to resort to section 6 of the Act in question. The code (so far as it extends [2]) is intended to be exhaustive; and where under its provisions the period for receiving compensation has not arrived, resort cannot be had to section 6.[3] S. 6 not available if application premature under other sections.

Occasionally, however, claims in respect of prospective damage have been considered capable of being immediately dealt with; and have accordingly been allowed under section 81 of the Rail. Cl. Act,[4] or section 25 of the Wat. Cl. Act; [5] and notwithstanding the words "from time to time" in those sections. Exceptions to general rule.

Thus in *Whitehouse* v. *Wolverhampton Railway Co.*[6] the mine owner was in course of working a continuous seam of coal, when the railway company took a narrow strip of surface which intersected the coal. His workings had been confined to the south side of the strip, but were rapidly approaching the north side; and he was about to sink two additional pits in order to get the coal on the north. The intended site of one of these pits was in the centre of the railway strip, and had been selected because it could be worked by the engine of an existing pit on the south; and the mine owner had already acquired the right to lay spoil on an area beside the site. In consequence of the site being taken by the railway company, he was under the necessity of sinking the pit in a position from which it could not be worked by the engine of the old pit, and of acquiring other land for the deposit of the spoil. In these circumstances the mine owner claimed (1) the expense of engine and plant for the new pit; (2) the extra expense of working the engine; (3) the expense occasioned by change of site; (4) the extra expense of raising pit frames and depositing Whitehouse *v.* Wolverhampton Rail. Co.

5 Exch. 6, cited *supra*; and see *In re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 469.

[1] 1894, 2 Q. B. 915; 1895, 1 Q. B. 459. See also Holliday *v.* Wakefield, 1891, A. C. 99, *per* Lord Watson.

[2] As to the scope of the code, see *post*, pp. 392 *et seq.*

[3] Holliday *v.* Wakefield, 1891, A. C. 81. As to s. 6, see *ante*, pp. 371, 374.

[4] See *ante*, pp. 372, 373.

[5] See *ante*, p. 377.

[6] L. R. 5 Exch. 6.

spoil; and (5) the cost of providing new land for spoil.[1] The mine owner was allowed these expenses.

Holliday *v.* Wakefield.

So in *Holliday* v. *Wakefield*,[2] where the mine owners were held entitled to compensation in respect of the loss arising from their being compelled to sink a pit outside the site on which they had originally intended to sink.[3]

c. Scope of Code.

Works protected by the Acts.

The works protected by the Rail. Cl. Act are the railway and the works connected therewith.[4] The works protected by the Wat. Cl. Act are the reservoirs and buildings belonging to the undertakers; and the pipes, conduits and other works, which are underground, and are described in the plan which is required to be kept and deposited.[5]

Surface ownership not essential.

In the case of railways and other surface works and buildings there is usually surface ownership.[6] But, even in the case of railways, it is not, in order that the code may apply, essential that this should be so. Thus in *L. & N. W. R. Co.* v. *Ackroyd*,[7] and *L. & N. W. R. Co.* v. *Howley Park, &c., Co.*,[8] where the right to make and maintain a tunnel was granted, it was held, that the right to work under sections 78 and 79 of the Rail. Cl. Act was the same as if the land actually occupied by the tunnel had been purchased.[9] Where, as in the case of the Wat. Cl. Act, and the Pub. Health Act, 1883, the works are, or include, underground works, there is frequently either no surface ownership, or only a partial surface ownership.[10]

Locality of mines mentioned in the Acts.

The mines mentioned in the Acts are those which lie under; or within the prescribed distance, or (if no distance be prescribed) within forty yards from; the works in question.[11]

[1] The facts are taken from Lord Watson's judgment in Holliday *v.* Wakefield, 1891, A. C. at p. 98.

[2] 1891, A. C. 81: see pp. 84, 95, 98.

[3] See also *In re* Gerard and L. & N. W. R. Co., 1894, 2 Q. B. 920; 1895, 1 Q. B. 468.

[4] See s. 78.

[5] See ss. 19, 22, 25. As to the works protected by the Pub. Health Act, 1883, see *post*, p. 429.

[6] See New Moss Coll. *v.* Manchester Corporation, 1908, A. C. 124.

[7] 31 L. J. Ch. 588.

[8] 1911, 2 Ch. 97. The claim in respect of the tunnel was dismissed by Eve, J., and was not opened by the R. C. in the Court of Appeal.

[9] Cf. the cases cited *ante*, pp. 349, 350. Cf. also the Sc. case of Cal. R. Co. *v.* Henderson, 4 R. 140.

[10] See New Moss Coll. *v.* Manchester Corporation, 1908, A. C. at p. 124.

[11] *Ib.*, at p. 123.

Statutory meanings of "mines" and "minerals."

One of the most important questions, if not the most important, arising under the code, is, what the words "mines" and "minerals" mean. This question has been already fully dealt with.[1]

Immaterial whether subjacent mines also purchased.

The code will apply, although the original purchase has included a part of the subjacent mines, as well as the surface; and will so apply, whether the mines desired to be worked are themselves also subjacent or are lateral.[2] And where the mines desired to be worked are lateral, the code will also apply, although the original purchase has included the whole of the subjacent mines, as well as the surface.[3] And where the subjacent mines, or parts of them, instead of being included in the original purchase, are purchased subsequently, the position is the same.[4]

Effect of voluntary sale.

In most of the cases under the Rail. Cl. Act the purchase was compulsory; and in many of the cases there are observations, which suggest that the compulsory nature of the transaction was important.[5] The code, however, under the Rail. Cl. Act equally applies where the transaction is voluntary: either because no compulsory powers were ever applicable, or because they had expired.[6] The position under the Wat. Cl. Act is *à fortiori;* as two sections of that Act provide in terms for contractual variations of the code.[7]

Difference between earlier and later sections.

There is a difference in language between the earlier and the later sections. Section 77 of the Rail. Cl. Act applies to mines "under any lands purchased." Section 78 applies to mines lying "under the railway or any of the works connected therewith, or within the prescribed distance, or where no

[1] *Ante*, pp. 43 *et seq.*

[2] *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 459, affirming S. C. 1894, 2 Q. B. 915; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 278, 292, 294—296, *per* Farwell, J.

[3] Holliday *v.* Wakefield, 1891, A. C. 81; Manchester Corporation *v.* New Moss Colliery, *sup.*

[4] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 97: see pp. 111, 121.

[5] See Fletcher *v.* G. W. R. Co., 4 H. & N. 252, 253; 5 H. & N. 697; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 40; *Re* Gerard *v.* L. & N. W. R. Co., 1895, 1 Q. B. 464; Manchester Corporation *v.* New Moss Colliery, 1906, 2 Ch. 575, 576; New Moss Colliery *v.* Manchester Corporation, 1908, A. C. 120, 121, 124.

[6] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 97: see pp. 101, *per* Eve, J.; 112, 113, *per* Moulton, L.J. The general principle was involved in the decision as to the purchase by the Company of the two underlying seams: see also N. B. R. Co. *v.* Turners, 6 F. at p. 911.

[7] See ss. 22 and 25.

distance shall be prescribed, forty yards therefrom." And there is a corresponding difference between section 18 and section 22 of the Wat. Cl. Act. The earlier and later sections in each Act may therefore affect different classes of persons.

Later sections not confined to mines excepted under earlier.

For example, the later sections apply to the mines excepted under the earlier. But they also apply to lateral mines lying within the prescribed distance, and it makes no difference if the owner of such lateral mines and the owner of the excepted mines are strangers in title.[1] "The fact that they lie within the prescribed distance is . . . sufficient to bring them within the scope of the section."[2] In these respects the later sections resemble those mentioned in division (γ) of section 3 of the present subject.[3]

Subsequent partial purchase of mines.

So the earlier sections are confined to the case where the surface is purchased either alone, or simultaneously with, a partial purchase of the mines.[4] They cannot apply to a case where there is partial purchase of the mines subsequent to the original purchase of the surface. The reason is that a purchase of one or more specified mines would not, *primâ facie*, include any mines below them.[5] The later sections, however, apply to such a partial subsequent purchase.[6]

L. & N. W. R. Co. *v.* Howley Park, &c., Co.

In *L. & N. W. R. Co.* v. *Howley Park, &c., Co.*[7] the railway company, many years after the original surface purchase, purchased two specified mines from the vendors' successors and took conveyances of them in fee simple. The defendants were the lessees of the underlying mines from the vendors' successors. If the defendants were prevented from working so as to let down the purchased mines, the surface would also have been protected. There was no evidence that the working of the underlying mines would let down the purchased mines without letting down the surface.[8] It was held that, the railway

[1] See Glasgow *v.* Farie, 13 A. C. 690, *per* Lord Macnaghten; N. B. R. Co. *v.* Turners, 6 F. 909, *per* Lord Pearson; Manchester Corporation *v.* New Moss Coll., 1906, 1 Ch. 295, *per* Farwell, J.; New Moss Colliery *v.* Manchester Corporation, 1908, A. C. 123, *per* Lord Atkinson; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 109, 115, 131, *per* Hardy, M.R., and Moulton and Buckley, L.JJ.

[2] L. & N. W. R. Co. *v.* Howley Park, &c., Co., *sup.* 115, *per* Moulton, L.J.

[3] *Ante*, p. 364.

[4] As in Gerard *v.* L. & N. W. R. Co. 1895, 1 Q. B. 459.

[5] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 111, 131.

[6] L. & N. W. R. Co. *v.* Howley Park, &c. Co., 1911, 2 Ch. 97.

[7] 1911, 2 Ch. 97.

[8] *Ib.* 132.

company were not entitled to prevent the defendants from letting down the purchased mines without making compensation under section 78.[1]

Previous severance.

So the earlier sections are confined to the case of the person who is owner of both surface and mines at the time of the surface purchase. Whether the later sections apply where there has been a previous severance of the surface and the mines will be subsequently considered.[2]

Effect as regards third parties.

With one exception the code does not affect the rights of third parties. It does not, for example, affect them under section 79 of the Rail. Cl. Act.[3] The exception is under section 82 of that Act ; which, however, applies exclusively to works constructed under section 80, and provides full compensation for the parties affected.[4]

Limitations upon scope of code.

And although the scope of the code is wide, it is not without limitations of great importance ; which include the following : (1) It has a partial effect only under the Wat. Cl. Act, where there has been a pre-existing right of support.[5] And there are grounds for suggesting that the position, where there has been a pre-existing right, is similar under the Rail. Cl. Act.[6] (2) It has no effect as regards substances which (*a*) are not under the land purchased, (*b*) are inside the prescribed distance, and (*c*) are not " minerals " within the statutory meaning of the word.[7] (3) It has no effect as regards substances, whether " minerals " or not, outside the prescribed distance.[8] It will be convenient to defer until later [9] the further discussion of these and other limitations upon the scope of the code ; and of the resulting position.

d. Position where pre-existing Right of Support.

(*a*) *Generally.*

Generally.

Where a right of support existed prior to the statutory purchase, the question of its continued existence under the code is not the same as the question, whether, having regard

[1] Affirming the decision of Eve, J., on this point.

[2] See *infra* and succeeding pages.

[3] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 117, 118, *per* Moulton, L.J.

[4] *Ib.* 117, *per* Moulton, L.J.

[5] See *post*, pp. 396 *et seq.*

[6] See *post*, pp. 399 *et seq.*

[7] See *post*, pp. 402, 424, *et seq.*

[8] See *post*, pp. 425 *et seq.*

[9] See the references in the four preceding notes.

to the code, a right of support came into existence upon the statutory purchase. The onus is upon the mine owner to show that a right which once existed has been taken away by the code. General questions which arise, when there has been a pre-existing right of support, have been already stated.[1] The position will now be dealt with in more detail. Under the Wat. Cl. Act the position is clear, both inside and outside the prescribed distance; and it will be convenient to refer first to that Act. It is submitted that the position under the Rail. Cl. Act cannot be considered clear inside the prescribed distance; although it is clear outside it.

(β) *Waterworks Clauses Act.*

S. 23.

Section 23 of the Wat. Cl. Act provides, that, in default of a counter-notice, it shall be lawful for the mine owner "to work the said mines, and to drain the same by means of engines or otherwise, *as if this Act and the special Act had not been passed*, so that no wilful damage be done to the said works, and so that said mines be not worked in an unusual manner."

Effect—Court of Appeal in New Moss Case.

The effect of these words was thus stated in the Court of Appeal in the *New Moss* case: The parties are remitted to their common law rights; "the corporation on the one hand not being entitled to any protection in respect of the greater weight imposed upon the land by reason of the reservoirs and other works, and the mine owners on the other hand not being at liberty to do anything which would at common law have been an actionable nuisance."[2] Of course these observations are confined to the position inside the prescribed distance.

Position outside prescribed distance—Court of Appeal in same case.

The position outside the prescribed distance was thus stated in the same Court and case: "No protection seems to be given in any event to the undertakers. The mine owners are under no obligation to give a statutory notice under section 22, and the undertakers have no power to stop any such workings by means of a counter-notice, and I can see no reason why the mine owners should not be liable to the undertakers. . . . In short, it seems to me, that sections 18 to 27 have no application."[3]

[1] See *ante*, pp. 303, 307, 324.

[2] See Manchester Corporation *v.* New Moss Colliery, 1906, 2 Ch. 576, *per* Hardy, L.J.: see also L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 110, *per* Hardy, M.R.

[3] 1906, 2 Ch. 576, 577, *per* Hardy, L.J.

The general effect as regards both points was thus stated in the House of Lords in the same case: "I do not understand how a decision as to the rights created between vendor and purchaser upon the separation of surface from underlying minerals can govern the rights between the owners of two plots of land between whom there is no privity of contract." . . . "The mine owner is authorised to work into the belt as if the Act of 1847 and the special Act had not been passed—that is to say, if he has apart from the Acts a right to let down the surface he may do so. If he has no such right, then the Acts do not enable him to do so." . . . "The Wat. Cl. Act does not operate to obliterate all pre-existing right to support for the surface from minerals, either subjacent or adjacent to the works, whenever lands are purchased by virtue of the Act. I can see no ground for such a contention. It would involve a free gift to neighbouring mineral owners of a most valuable right, and a ruinous withdrawal from the undertakers of rights most essential to the safe maintenance of waterworks, without compensation, and, so far as I can see, without reason." . . . "The contrary argument amounts to this, that because a conveyance under the Act of surface, leaving minerals in the hands of the vendor, does not confer upon the surface a right to support, therefore, whenever any land is bought by undertakers by virtue of the Act, every easement for support heretofore attaching to it, whether vertical or lateral, is destroyed." [1]

General effect as stated in House of Lords in same case.

The facts in the *New Moss* case (*New Moss Colliery* v. *Manchester Corporation* [2]) were as follows: The corporation (with whose Acts the Wat. Cl. Act was incorporated) had power to purchase certain lands, but to purchase by agreement only. They had power to purchase other lands, either by agreement or compulsorily. They also had power to construct a reservoir on the land purchased. They purchased both classes of lands; and, as regards the latter, without exercising their compulsory powers; and they constructed a reservoir on the lands purchased. Certain mines which laterally adjoined; and were

New Moss Colliery *v.* Manchester Corpn.

[1] See 1908, A. C. 122—123, *per* Lord Loreburn. Cf. the observations of Vaughan Williams, L.J.; 1906, 2 Ch. at pp. 572—573.

[2] 1908, A. C. 117; Consett Wat. Co. *v.* Ritson, cited, *post*, pp. 401, 402, was a previous case under the Wat. Cl. Act; but the position under that Act and the Rail. Cl. Act was there said to be identical.

partly within forty yards from the reservoir, and partly outside that distance, were held by lessees, between whom and the several vendors there was no privity of title.[1] The lessees gave notice of their intention to work. The corporation gave no counter-notice. The lessees worked, and the workings injured the reservoir. Part of the injury was due to workings within the forty yards, and part to workings outside. The reservoir was constructed more than twenty years before action.[2] The injury would have taken place to an equal extent if the reservoir had not been there.[3] As regards the injury due to workings inside the prescribed distance it was held that the parties were remitted to their common law rights.[4] And, as regards the injury due to workings outside the prescribed distance it was held, that there was nothing in the Act to take away the pre-existing right of support. An injunction was, therefore, granted under each head.[5]

Result of New Moss case.

This decision established three points: (1) that, notwithstanding the pre-existing right, the code applied to the minerals inside the prescribed distance down to the actual time, when a counter-notice might have been given with effect; [6] (2) that, upon the expiration of this time, the corporation, by virtue of the pre-existing right, became free from the code as regards the same minerals; and (3) that the pre-existing right throughout saved the corporation from the code as regards the minerals outside the prescribed distance.[7]

Effect of subjacent purchase on lateral support.

There are observations of Lords Loreburn and Atkinson in the *New Moss* case; [8] and of Moulton and Buckley, L.JJ., in *L. & N. W. R. Co.* v. *Howley Park, &c., Co*; [9] from which it might be inferred that, where the purchase has included the whole of the subjacent mines, as well as the surface, the purchasers get a larger right of lateral support for the surface

[1] The reports in the Law Reports only deal with the lands as to which there was a power to purchase by agreement. But on Dec. 11, 1906, when the order of the Court of Appeal came to be settled, the injunction went as to both classes of lands.

[2] See, as to this, *ante*, pp. 321—323.

[3] See, as to this, *ante*, pp. 306, 307.

[4] Affirming the decision of the Court of Appeal nom.; Manchester Corporation *v.* New Moss Colliery, 1906, 2 Ch. 564, which reversed that of Farwell, J., 1906, 1 Ch. 278.

[5] See the references to this case in L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 110, 124—126, 130—131.

[6] As to this, see *post*, pp. 407–410.

[7] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 110, 124—126, 130—131.

[8] 1908, A. C. at pp. 121, 122, 124.

[9] 1911, 2 Ch. at pp. 125, 130, 131.

than they would have had if the subjacent mines had not been included. Lord Loreburn, however (if not Lord Atkinson also), was probably referring merely to the difference between a case like *G. W. R. Co.* v. *Bennett*, in which there had been a separation of the surface from the underlying mines, and the case before him. It is not easy to see why the additional purchase of the subjacent mines can at common law give any additional right of lateral support for the surface.

(γ) *Railways Clauses Act.*

S. 79. Whether the position inside the prescribed distance is the same under the Rail. Cl. Act depends upon the question whether section 79 of that Act has the same effect as section 23 of the Wat. Cl. Act. The words "as if this Act and the special Act had not been passed," which occur in section 23 of the latter Act, do not occur in section 79 of the former. Are they to be implied? The question is one of great importance; and it will be convenient to refer in their order to the relevant authorities.

G. W. R. Co. v. Fletcher, *per* Cockburn, C.J. *G. W. R. Co.* v. *Fletcher*,[1] the first of the cases decided under the Rail. Cl. Act, contained the following general dicta by Cockburn, C.J.: "If, indeed, prior to the conveyance there was any separation of the surface soil from the minerals, the right of support would no doubt belong to the company, because, if a landowner parts with the surface soil, he does so subject to the obligation of dealing with the substratum so as not to disturb the superincumbent soil. In such case the landowners, having parted with the surface, and there being attached to the ownership of the soil the right to the support of the stratum below, would not be entitled to any compensation for the loss they may sustain in not working the minerals." [2]

Pountney *v.* Clayton—previous severance by lease of mines. *In Pountney* v. *Clayton*[3] the owner of land demised the subjacent mines to the defendant. A railway company afterwards compulsorily acquired the rest of the land. They subsequently sold as "superfluous" part of the land so acquired; and that part became vested in the plaintiff. The

[1] 5 H. & N. 698.
[2] *Ib.*, p. 698.
[3] 11 Q. B. D. 820.

defendant withdrew support from the surface. It was admitted that the vendor to the company had a right, as between himself and the defendant, to have the surface supported. But it was nevertheless held that such right had not passed to the company; that the company could not give to their purchaser any greater right than they themselves possessed; and that the plaintiff was accordingly without a remedy.[1] And the result, it was said, would be the same, although the mineral lessee might have entered into an express covenant with his lessor not to let down the surface.[2] It was said, that such covenant might, for what it was worth,[3] continue to bind the parties; but that this consequence could not affect the construction of the Act.[4]

Other cases of severance —*per* Bowen, L.J.

Whether the same result ought to follow where the severance is not for a term of years, but is perpetual, or where it is by way of a lease or sale of the surface, or where the origin of it is unknown, was not directly decided in *Pountney* v. *Clayton*.[5] Bowen, L.J., however, disagreed with what he understood to be the effect of the dicta of Cockburn, C.J., already cited;[6] and expressed the opinion that section 79 of the Rail. Cl. Act applied equally to all cases of severance. "Take the broadest case: that of a surface owner who has conveyed to a railway company, and of a mine owner who is bound to support the surface land, not by any deed, but because nothing is known to the contrary; that is, when the surface owner comes within the second of the classes I have mentioned. Does section 79 deal with that right to support? It applies to every owner or occupier of any mine within forty yards of the railway, and you must cut down and alter the words of that section in order to deprive the miner of his liberty to work his mine. If that be true of class No. 2, it is also true of class No. 3;" [7] that is to say, the case of a surface owner who has the right to support created by the document which effected the severance.

[1] See also Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 327; see L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at pp. 121—122; and see *post*, p. 427.

[2] See Pountney *v.* Clayton, 11 Q B. D. 837; *per* Lord Esher, 843, 844, *per* Bowen, L.J.

[3] See Consett Wat. Co. *n.* Ritson, *sup.* 328, *per* Smith, J.

[4] See Pountney *v.* Clayton, *sup.* 844, *per* Bowen, L.J.

[5] *Sup.*

[6] *Ante*, p. 399.

[7] 11 Q. B. D. at p. 843.

In *Consett Waterworks Co.* v. *Ritson*[1] an Inclosure Act reserved the mines to the lord. The plaintiffs acquired under their Act (which incorporated the Wat. Cl. Act) part of the surface, and constructed a reservoir upon it. The defendant, who claimed under the lord of the manor, gave notice of his intention to work within forty yards of the reservoir; and, the plaintiffs not having offered to make compensation, worked the same accordingly, and in so doing injured the reservoir. The Court (Smith and Cave, JJ.) held (1) that the Inclosure Act gave no right to let down the surface. They then considered (2) how the Wat. Cl. Act affected the position; and, in doing this, they discussed *Pountney* v. *Clayton*. Smith, J., said that a mine owner would not have been prevented from working under the Wat. Cl. Act by the words "as if this Act and the special Act had not been passed;" that he would not have been prevented in railway cases; and that the position under the Acts was identical.[2] Cave, J., did not say that he agreed as to this; but he expressed no disagreement. They differed, however, upon the question whether *Pountney* v. *Clayton* was in fact applicable. Smith, J., held that it was; a lease of mines being in substance a sale;[3] and he therefore decided in favour of the defendant. Cave, J., held that *Pountney* v. *Clayton* was distinguishable, as the reversioner in that case had an interest in the minerals over and beyond the interest of the lessee, and was entitled to be compensated therefor;[4] and he then decided in favour of the plaintiffs. The Court of Appeal reversed the decision upon the first point; holding that the Act gave a right to let down the surface;[5] and this made it unnecessary for them to deal with the second point. The case was not taken further; but many years afterwards, in the *Butterknowle* case,[6] the House of Lords overruled the decision of the Court of Appeal in the *Consett* case.

Consett Wat. Co. *v.* Ritson.

Although, however, in the result, there was no actual decision in the *Consett* case upon the question now under

Per Cave, J., in Consett Wat. Co. *v.* Ritson.

[1] 22 Q. B. D. 318, decided on the corresponding sections (ss. 18, 22, and 23) of the Wat. Cl. Act.

[2] See pp. 328, 329.

[3] See p. 327; see *ante*, p. 188.

[4] On the principle laid down in Smith *v.* G. W. R. Co., 3 A. C. 165, as to which see *post*, p. 411.

[5] See 64 L. J. Ch. 293 n. There is a note of the case at 22 Q. B. D. 702.

[6] 1906, A. C. 305, *ante*, p. 337.

discussion, it will be useful to refer to the grounds on which Cave, J., decided the second point in favour of the plaintiffs :— (1) The surface owner, before the plaintiffs purchased, was entitled to two separate rights : (*a*) the right to the surface without regard to the right to have it supported, and (*b*) the right to have the surface supported. (2) When he sold to the plaintiffs he was entitled to and presumably got compensation from them for both rights, and not merely for the first of them. (3) If he was only entitled to and got compensation from the plaintiffs for the first of such rights, there was no means by which he could subsequently get compensation from the mine owner for the second of them. (4) A decision against the plaintiffs would therefore give to the mine owner an advantage for which he had not paid, at the expense either of the plaintiffs or of the surface owner. It is obvious that these grounds, although expressed to be confined to the case then before the Court, apply with equal force to *Pountney* v. *Clayton*.

New Moss Case.

In *Manchester Corporation* v. *New Moss Colliery*, Farwell, J., said that the words " as if this Act and the special Act had not been passed " must be implied in section 79 of the Rail. Cl. Act.[1] And, when the case was in the House of Lords, Lord Robertson, who was present during a part of the argument, although he took no part in the judgment, expressed the same opinion. Lord Loreburn's observations in the same case as to the contention then before him involving " a free gift to neighbouring mineral owners " have been already cited ; [2] and there does not appear to be any sufficient ground for confining the spirit of them to the Wat. Cl. Act.

L. & N. R. Co. *v.* Howley Park, &c., Co.

In *L. & N. W. R. Co.* v. *Howley Park, &c., Co.*,[3] Hardy, M.R.,[4] referring to the *New Moss* case,[5] used language, which perhaps suggests that, in his view, the words " as if this Act and the special Act had not been passed " ought not to be implied in section 79 of the Rail. Cl. Act. Moulton, L.J., said as follows :—" These rights and privileges are given to them by statute and not by contract ; and they are unaffected by any transactions between the railway company and third

[1] 1906, 1 Ch. 292.
[2] *Ante*, p. 397. .
[3] 1911, 2 Ch. 97.
[4] *Ib.*, p. 110.
[5] *Ib.*, p. 130.

parties.[1] . . . In my opinion this" (*i.e.* section 79) "gives to the owner of the mines a statutable right as against the railway company to work those mines. No exceptions or limitations to this right are expressed, and I can see no ground for holding that any are implied; and I am of opinion that the right is absolute as against the railway company, no matter what rights the railway company may have acquired from third parties. Section 79 is the complement to section 78, and every mine that is under the burden of the rights of the railway company under section 78 has the privileges as against that railway company which are given by section 79. It will be seen that, not even when the railway company refuses to give compensation, is the mine owner relegated to his common law position. The right of working the mines as he wishes is taken from him. He may only work them according to the usual manner of working such mines in the district where the same shall be situate, and in a manner proper and necessary for the beneficial working thereof; and the latter part of the section gives to the railway company most effective statutory remedies against him in case he does not observe these new restrictions on the working of the mines. The language in which these rights and remedies are given to the railway company is just as general, and just as absolute, as the language of the rest of the section, and of section 78, and gives complete support to the view that, under these sections, the mutual rights are entirely statutable, and are independent of any rights which either party may have acquired *aliunde*." [2] The Lord Justice subsequently referred to *Pountney* v. *Clayton* with obvious approval; [3] and he also pointed out, what, in his view, were the leading differences in language between the two Acts. The first of these was, what he thought, the incapacity of railway companies, as contrasted with waterworks undertakers, to contract out of the code.[4] This question has been already referred to.[5] The second was the absence from section 79 of the qualifying words; which raises the actual question now under discussion.[6] As regards the observation of the Lord Justice, that, in railway

[1] 1911, 2 Ch. 115.
[2] *Ib.* 116.
[3] *Ib.* 121—122.
[4] *Ib.* 124—125.
[5] *Ante*, pp. 165—167.
[6] 1911, 2 Ch. 125.

cases, the mine owner is not "relegated to his common law position," it may be pointed out that a similar observation might be made as regards waterworks cases. In the latter cases also the mine owner must not work in an unusual manner: and, if he does, there are equally "effective statutory remedies." Buckley, L.J.,[1] probably took the same view as Hardy, M.R.

Observatoins upon the authorities.

Pountney v. *Clayton*,[2] and the *Howley Park* case,[3] are of course weighty authorities upon the question under discussion. But as against them may be set the dicta of Cockburn, C.J., in *Fletcher's* case; of Smith, J., in the *Consett* case; of Farwell, J., and Lord Robertson in the *New Moss* case; and (most important of all) of Cave, J., in the *Consett* case.[4] The observations of Lord Loreburn [5] in the *New Moss* case as to a "free gift," although not in terms addressed to railway cases, are also, it is submitted, of importance. The measure of the "free gift" may be gathered from a comparison of the figures in *Bennett's* case;[6] and indeed from the observations made by Moulton, L.J., himself [7] in the *Howley Park* case. It is, moreover, not immaterial to notice Lord Cranworth's observations in *Bennett's* case; admittedly the leading case on the whole subject: "*Justice* obviously requires, that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be *just in the same position* as if he had never sold any part of the surface at all." [8] Where is the justice of making him a "free gift"? The chronology of the Acts also affords ground for a suggestion, which could not have been made if the Wat. Cl. Act were prior in date, that the qualifying words in that Act were inserted merely *ex abundanti*, and ought to be implied in the Rail. Cl. Act.

Position outside prescribed distance.

The foregoing observations are confined to the position inside the prescribed distance. Outside that distance the position, in the case of a pre-existing right, is as clear as in cases under the Wat. Cl. Act; and the observations of Hardy, L.J., already cited,[9] are as applicable.

[1] 1911, 2 Ch. 130.
[2] 11 Q. B. D. 820.
[3] 1911, 2 Ch. 97.
[4] See *ante*, pp. 399, 401, 402.
[5] *Ante*, p. 397.
[6] *Ante*, p. 386.
[7] 1911, 2 Ch. 114.
[8] *Ante*, p. 382.
[9] See *ante*, p. 396.

e. Machinery of Code.

(*a*) *Notice of Intention to Work.*

Obligation to give notice.

The person entitled to give the notice mentioned in section 78 of the Rail. Cl. Act, and in section 22 of the Wat. Cl. Act, is bound to give it before he begins to work.[1] It has been already seen,[2] that, notwithstanding a pre-existing right of support, the code under the Wat. Cl. Act applies to minerals inside the prescribed distance down to the actual time when a counter-notice might have been given with effect;[3] and accordingly the obligation to give the original notice exists in such cases, as well as in ordinary cases.[4] There is, however, no obligation to give a notice so far as respects non-"minerals"[5] inside the prescribed distance;[6] or so far as respects any substances, whether "minerals"[5] or not, outside it.[7] And there is no obligation to give a notice to the purchaser of superfluous lands.[8] Although a mine owner, who works a part of his minerals without giving notice acts illegally, he is not precluded from subsequently giving a notice as regards the remaining part.[9]

Person entitled to give notice—generally.

The "owner, lessee, or occupier of any mines or minerals," entitled to give the notice means the person who has the right to presently work the mine in question.[10] An owner is entitled to give the notice, although he intends to let the mine, and not to work it himself.[11] A person having a licence to enter and search for minerals, with a right to carry them away,[12] cannot properly be described as an occupier of the mines; but he is an "occupier of any mines or minerals" within the statutory

[1] See the sections: see Dixon *v.* Cal. R. Co., 5 A. C. at p. 839; N. B. R. Co. *v.* Turners, 6 F. at 908; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 109.

[2] *Ante*, p. 398.

[3] See *post*, p. 407.

[4] See New Moss Colliery *v.* Manchester Corporation, 1908, A. C. at p. 122, *per* Lord Loreburn.

[5] As to the statutory meaning o minerals, see *ante*, pp. 43 *et seq.*

[6] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 120.

[7] *Ib.* 110, 126.

[8] See Pountney *v.* Clayton, 11 Q. B. D. 820; L. & N. W. R. Co. *v.* Howley Park, &c., Co. at pp. 121, 122.

[9] Edinburgh Trustees *v.* Clippens Oil Co., 25 R. 504.

[10] See Smith *v.* G. W. R. Co., 3 A. C. 178—180, 185, 188, 191; Eden *v.* N. E. R. Co., 1907, A. C. 408.

[11] Mid. R. Co. *v.* Robinson, 37 Ch. D. 386; 15 A. C. 19.

[12] See *ante*, p. 270.

words.[1] Of course a person without any title whatever may not give a notice.[2]

Lord and copyholder.

Where the lord of a manor is entitled, under the custom, to work without the copyholder's consent, he may apparently give the notice. Where he is not so entitled, he may not [3] apparently give it, unless the copyholder concurs, and then only if, upon the purchase by the railway or waterworks company, the possessory interest in the mines remained unaffected.[4]

Subsequent notice as to different mineral.

The fact that a notice has been given and compensation received in respect of one kind of mineral, such as coal, does not preclude the person then or afterwards having a right to work another kind of mineral, such as ironstone, from subsequently giving a notice and receiving compensation in respect of the latter mineral.[5]

Intention to work need not be immediate.

A notice of an intention to work is not invalid, merely because it is not intended to be acted upon at once. It is not necessary, that there should be an intention to work immediately, or apparently even within what may be deemed a reasonable time, if there is in fact an intention to work.[6] This result does not cause any practical injury to a company; because, if a mine owner, several years after he gave his notice, suddenly began to work, he would run the risk of having his notice treated either as having been given in bad faith, or as having been abandoned.[7] He would also expose himself to an indictment for manslaughter, if fatal injury resulted from his acts.[8] And, apart from that, the Court might interpose to restrain him by injunction.[9]

Intention to work must be *bonâ fide*.

A mine owner will not, however, it seems, be allowed to force a company into arbitration, where it appears that no injury can possibly arise from his workings.[10] And in all cases

[1] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552, 561; Glasgow *v.* Farie, 13 A. C. 692, 693, *per* Lord Macnaghten.

[2] Dixon *v.* Cal. R. Co., 5 A. C. at 833; N. B. R. Co. *v.* Turners, 6 F. 900.

[3] See Smith *v.* G. W. R. Co., 3 A. C. at p. 179.

[4] See, as to this, *ante*, pp. 68, 164.

[5] See Smith *v.* G. W. R. Co., 3 A. C. 182, 183, *per* Lord Cairns.

[6] Mid. R. Co. *v.* Robinson, 37 Ch. D. 390, 391.

[7] *Ib.* 402, 403, *per* Lindley, L.J.

[8] *Ib.* 399, 406, *per* Cotton and Lopes, L.JJ.

[9] *Ib.* 406, *per* Lopes, L.J.

[10] See Dixon *v.* Caledonian, &c., Companies, 5 A. C. 839; Mid. R. Co. *v.* Robinson, 37 Ch. D. 396, 397.

a notice of an intention to work should be *bonâ fide*.[1] "There must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let them or work them himself, that would be vexatious, and the Court would not allow that to be acted upon." [2] Any other result would be inconsistent with the principle on which the code is based.[3]

A mine owner is obliged to give thirty days' notice to a railway or waterworks company of his intention to work.[4] Length of notice.

(β) *Counter-notice.*

The company are not bound to any fixed period within which they must give a counter-notice.[5] If at any time thereafter they fear danger to the line, they can stop the working, or (if it has been already begun) the prosecution of the working, by a notice of their willingness to pay compensation for the minerals which are unwrought, and which they desire to be left standing. No doubt *Smith* v. *G. W. Railway Co.*, a case in the House of Lords,[6] contains a dictum to the contrary ;[7] but the dictum was overruled in a subsequent case before the same tribunal.[8] There appears also to be nothing to prevent the company from giving a counter-notice as to part of the minerals at one time, and another part at another time, so as to enable them to limit the compensation payable at any Counter-notice —when to be given.

[1] See Dixon *v.* Cal. R. Co., *sup.* 841 ; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 558 ; Glasgow, &c., R. Co., *v.* Bain, 21 R. 134 ; N. B. R. Co. *v.* Turners, 6 F. 900.

[2] Mid. R. Co. *v.* Robinson, 37 Ch. D. 397, *per* Cotton, L.J. ; approved in S. C. 15 A. C. 32, *per* Lord Herschell. See also Eden *v.* N. E. R. Co., 1907, A. C. 408.

[3] See *ante*, pp. 380 *et seq.*

[4] See Rail. Cl. Act, 1845, s. 78, *ante*, p. 371 : see also G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 42 ; Pountney *v.* Clayton, 11 Q. B. D. 836. The notice should in all cases be sufficient in point of form : see Dixon *v.* Cal., &c., Companies, 5 A. C. 823, 834.

[5] See Rail. Cl. Act, s. 79 ; Wat. Cl. Act, s. 23, cited *ante*, pp. 372, 376.

[6] 3 A. C. 165.

[7] See p. 182, *per* Lord Cairns. In L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 123, Moulton, L.J., by mistake, attributed a similar dictum to Lord Westbury in G. W. R. Co. *v.* Bennett.

[8] Dixon *v.* Caledonian, &c., Companies, 5 A. C. 820, a decision upon the Rail. Cl. Cons. (Scotland) Act, 1845. See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 561 ; Pountney *v.* Clayton, 11 Q. B. D. 836 ; Mid. R. Co. *v.* Robinson, 37 Ch. D. 395, 396 ; Holliday *v.* Wakefield, 1891, A. C. 100, 101.

one time to such part of the minerals only as may be in immediate danger of being worked.[1] Of course, if the thirty days have elapsed without a counter-notice, and the mine owner has begun to work, the counter-notice as to such portions as he has worked, will come too late.[2]

Effect of counter-notice—property not transferred—mere automatic fetter.

A counter-notice does not involve a transaction of sale and purchase. The mines continue the property of the landowner; and although he cannot remove them, neither can the company.[3] "Automatically . . . a fetter is placed by statute on the mine owner. . . . It is an arbitrary fetter, debarring the owner from dealing with a given area of land in a particular way, irrespective of whether it is more or less than is actually required for the support of the railway, and whether or not substituted support is supplied by shoring or other means.[4] . . . Nothing but a statute could create such a right, and a statute has created it." [5] "Such a right differs from a right of support. . . . In particular it differs in this, that the obligation under it is purely negative, whereas . . . a right of support to buildings is an easement not purely negative, and is capable of being created by grant." [6] "The counter-notice . . . does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all." [7]

Counter-notice—stamp duty.

Where, therefore, a colliery company gave notice of intention to work; and a railway company gave a counter-notice;

[1] Mid. R. Co. *v.* Robinson, 37 Ch. D. 396, *per* Cotton, L.J.; 402, 405, *per* Lindley and Lopes, L.JJ.

[2] Dixon *v.* Cal. R. Co., 5 A. C. at 832, 835, 837.

[3] Errington *v.* Met. R. Co., 19 Ch. D. 575; G. N. R. Co. *v.* Inland Rev. Comms., 1899, 2 Q. B. 657, 662, 1901, 1 K. B. 427, 428, 429; Bwllfa, &c. *v.* Pontypridd Wat. Co., 1903, A. C. 428, 429, 431, 432, 433; Richard and G. W. R. Co., 1905, 1 K. B. 68.

[4] G. N. R. Co. *v.* Inland Rev. Comms., 1901, 1 K. B. 427, 428, *per* Collins, L.J. Cf. the position of a mine owner not subject to the Acts, *ante*, pp. 315, 316.

[5] G. N. R. Co. *v.* Inland Rev. Comms., 1901, 1 K. B. 428, *per* Collins, L.J. A similar position is created under some of the special Railway and Canal Acts: see *ante*, pp. 354 *et seq.*

[6] G. N. R. Co. *v.* Inland Rev. Comms., *sup.* 428, 429, *per* Stirling, L.J. A mere negative fetter cannot be created by grant: see *ante*, p. 316.

[7] Bwllfa, &c. *v.* Pontypridd Wat. Co., 1903, A. C. 431, *per* Lord Macnaghten: see also Richard *v.* G. W. R.

and the railway company paid the compensation; and the colliery company executed an instrument under seal acknowledging receipt of the amount in satisfaction of all claims, and undertaking to leave the coal unworked; it was held, that such instrument was chargeable with a 10*s.* stamp only, and was not chargeable with *ad valorem* stamp duty.[1] The transaction was not a "conveyance on sale" under section 54 of the Stamp Act, 1891, or a "sale" of property or any interest in property under the schedule to the Act.[2] And it was not within section 60 of the Act, which imposed a charge "when upon the sale of any . . . right not before in existence such . . . right is not created by actual grant." The right to have the coal left unworked came into existence when the counter-notice was given; and it was not capable of being acquired by a common law grant.[3]

Wider effect of counter-notice in some respects.

In so far as the property in the mines remains in the landowner, the position created by a counter-notice is narrower than that created by a purchase.[4] But in other respects, as compared with the position created by a purchase, that created by a counter-notice is wider. The statutory power of preventing the working of a mine is not confined to mines lying under lands within the limits of those described, nor is it only (as in the case of a purchase which is compulsory [5]) exercisable within the prescribed time. It applies to mines under lands outside the limits, if within the prescribed distance; [6] and it is exercisable at all times.[7]

Counter-notice gives no right to conveyance.

Having regard to the difference between the position under a counter-notice and a purchase, a counter-notice does not entitle a railway or waterworks company, on payment of the compensation, to a conveyance of the mines.[8]

Counter-notice not withdrawable.

A counter-notice, once given, cannot be withdrawn.[9]

Co., 1905, 1 K. B. 68; Eden *v.* N. E. R. Co., 1907, A. C. 408, 411.

[1] G. N. R. Co. *v.* Inland Rev. Comms., 1901, 1 K. B. 416; affirming S. C. 1899, 2 Q. B. 652.

[2] G. N. R. Co. *v.* Inland Rev. Comms., 1899, 2 Q. B. 659, 662, 1901, 1 K. B. 416.

[3] G. N. R. Co. *v.* Inland Rev. Comms., 1901, 1 K. B. 416: see *ante*, pp. 315, 316.

[4] *Ante*, p. 164.

[5] See *ante*, p. 163.

[6] See *ante*, p. 394.

[7] Errington *v.* Met. R. Co., 19 Ch. D. 570, 575; G. N. R. Co. *v.* Inland Rev. Comms., 1899, 2 Q. B. 657; Devonshire *v.* Cal. R. Co., 7 F. 847.

[8] Hamilton Trustees *v.* Cal. R. Co., 7 F. 847.

[9] Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T. 275: affirming S. C., 3 F. 1113

Counter-notice—questions of title.

It has been said, that a notice and counter-notice do not constitute a contract to make compensation; and that they leave open questions of title.[1]

Power to give counter-notice.

There is no power to give a counter-notice, so far as respects non-"minerals"[2] inside the prescribed distance;[3] or, so far as respects any substances, whether "minerals" or not, outside it.[4]

(γ) *Compensation for Value of Minerals.*

When claimable.

It follows from what has been already stated, that compensation is only claimable in respect of substances which (*a*) are "minerals" within the statutory words, and (*b*) lie inside the prescribed distance.[5]

Time when claimable.

The time when the compensation may be claimed has been already considered.[6]

Person to be compensated.

The compensation to be paid under sections 78 and 79 of the Rail. Cl. Act, and sections 22 and 23 of the Wat. Cl. Act, as the price of stopping an intended working, means the compensation to which the person entitled to give[7] the statutory notice is individually entitled according to his interest.

Extent of interest.

If the person so entitled may remove the whole produce of the mine, and the extent of his tenure will enable him to do so, the compensation may mean the entire value of the minerals. If his right is not so great; if he cannot take away the whole, or his tenure will not enable him to do so; or if he cannot appropriate to his own benefit the whole of the produce; the compensation means that part of the entire value which is proportionate to his interest. And the mere fact, that, in cases of the latter kind, it may often be a matter of extreme difficulty to assess the compensation, seems immaterial.[8]

Reversioner—s. 6.

The compensation to be paid under these sections can only be obtained by the person entitled to give the notice; and,

[1] See Cal. R. Co. *v.* Symington, 48 S. L. R. 539.

[2] See *ante*, pp. 43 *et seq.*

[3] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 120.

[4] *Ib.* 110, 126.

[5] L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 110, 126: see *ante*, p. 405.

[6] *Ante*, pp. 389—391.

[7] See, as to this, *ante*, pp. 405, 406.

[8] See Smith *v.* G. W. R. Co., 3 A. C. 178, 179, 180, 185, 188, 191; and cf. Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 333—336, *per* Cave, J. As to the difficulty which may sometimes be met in assessing the compensation, see the instance put by Mellish, L.J. (G. W. R. Co. *v.* Smith, 2 Ch. D. 252), of a woman entitled during widowhood.

where the lessee is the person entitled to give it, the reversioner cannot under these sections obtain compensation, even though he may show a right of his own to be compensated beyond that of the lessee. In such a case, however, the reversioner may resort to section 6 [1] of the Act in question.

Smith *v.* G. W. Rail. Co.

Thus in *Smith* v. *Great Western Railway Co.*[2] the company purchased land without the subjacent coal. They constructed a part of their railway on the land so purchased. The landowner afterwards demised the coal. The lease was at an acreage rent; and the lessee covenanted to work out all the coal during his term. The lessee gave the company notice of his intention to work. The company compensated the lessee, and the coal was left unworked. The lessee afterwards surrendered the lease to the landowner; and the latter sold the mine to the defendant. Shortly before the expiration of the term, for which the lease had been granted, the defendant gave the company notice of his intention to work the coal left unworked by the lessee; and he claimed compensation without regard to the payment previously made to the lessee. The company offered compensation, having regard to their previous payment; and claimed an injunction. It was held by the House of Lords, that the legislature could never have intended that the company should be obliged to pay more than once for the same coal; and that, if the defendant was thereby prejudiced in respect of royalties to which he might have been entitled under the lease, the legislature had provided a special method of compensating him under section 6; and an injunction was granted.[3]

Proportion of compensation payable to lessee—Smith *v.* G. W. Rail. Co.

A further question was discussed, but not decided, in *Smith* v. *Great Western Railway Co.*[4] The company, on paying the compensation to the lessee, took from him a covenant to continue to pay the acreage rent. The lessee failed to make some of the payments which accrued due before the lease was surrendered. The company had, by their pleadings, offered to make good the arrears of rent to the lessor. Lord Cairns said that, but for the offer, he should have felt a difficulty in granting

[1] As to s. 6, see *ante*, pp. 371, 374.

[2] 3 A. C. 165.

[3] See the form of the decree, pp. 183, 192, 193. It affirmed G. W. R. Co. *v.* Smith, 2 Ch. D. 235. See also Bwllfa, &c. *v.* Pontypridd Wat. Co., 1903, A. C. 426 (at p. 430).

[4] 3 A. C. 165.

the injunction.[1] Lord Penzance, on the other hand, considered that the lessee had the entire interest in the minerals, that the whole compensation money had therefore been properly paid to him, and that the company were not bound to pay for the same thing twice over. The latter view is open to the objection, that the lessee's interest in the minerals was subject to the payment of rent, and to the rights of the lessor in case such rent was not paid.

Eden *v.* N. E. Rail. Co.

The possibility of similar questions arising, and their possible complication when they arise, were referred to in *Eden* v. *North Eastern Railway Co.*[2] In that case the difficulty was avoided by the lessee and the reversioner agreeing that the reversioner should receive a sum equivalent to his loss of royalty, and that the lessee should receive the remainder. And Lord Atkinson thought that the agreement was in accordance with the rights of the parties.[3] Lord Loreburn, however, intimated that his view was different. And he also intimated, that, in settling the proportion payable to the lessee, it is not right to assume that he would only work at the usual rate of working. He was entitled to work more rapidly if he pleased.[4]

Where reversion settled—generally.

Questions may also arise as between persons entitled to the reversion *inter se*.

Re Barrington.

In *Re Barrington*,[5] minerals were devised in trust for the defendant for life, with remainders over. The minerals were in lease at the testator's death. The lessee gave a railway company notice of his desire to work. The company paid compensation, and part of it was apportioned in respect of the lessor's interest. The minerals could have been got during the life of the defendant. The defendant was held entitled to the apportioned part.[6]

Robinson's Trusts—Cardigan *v.* Curzon-Howe—Fullerton's Will.

This decision has not, however, been followed. In *Robinson's Settlement Trusts*,[7] it was intimated, that the right mode of ascertaining the amount of compensation to be paid to the tenant for life would be to ascertain the number of years

[1] A. C. 181, 182.
[2] 1907, A.C.400: see pp. 406,409,413.
[3] *Ib.* 413, 414.
[4] *Ib.* 406.
[5] 33 Ch. D. 523.
[6] The decision was based on section 74 of the Lands Cl. Act, which relates to the taking of land, "where less than the whole fee simple thereof" is acquired. Cf. the decision in Robinson's Settlement Trusts, 1891, 3 Ch. 132, 133, which arose under s. 69, and is cited *ante*, p. 149.
[7] 1891, 3 Ch. at p. 133.

within which the minerals could be worked, and then to divide the compensation into the same number of parts, and to give the tenant for life one of such parts every year. And *Cardigan* v. *Curzon-Howe* [1] and *Re Fullerton's Will* [2] are actual decisions to a similar effect. And where it would have been impossible to work the minerals in equal instalments, the compensation will be apportioned according to the areas which would have been worked out in the successive years.[3]

Where reversion settled and lessee entitled to make up shorts.

Where, in such a case, the lessee is entitled to make up shorts; and the shorts exceed the reversioner's compensation; the lessee is not entitled to immediate payment of the reversioner's compensation; shorts being only a right of set-off against future royalties on the assumption that the working continues. But if he continues working, and paying the dead rent, he will become entitled to each instalment as it accrues.[4]

Measure of compensation —generally.

The compensation to which a mine owner is entitled, who is prevented from working, is "full compensation." [5] And this means what the minerals would have sold for, if worked, less the cost of working them.[6]

Measure of compensation —other mines available for working.

And the fact that there were other mines in the neighbourhood, which might have been worked, is not a matter to be considered. Thus in *Eden* v. *North Eastern Railway Co.*[7] There the mines in question were in lease: there were other mines included in the demise which the lessee might have worked; and he could not have worked all the demised mines during the term. The railway company contended, that the compensation to the lessee was the mere increased cost of working the other mines; and (in order to make their position consistent) they also contended that the compensation to the reversioner was the injury to the reversion, and not merely the loss of royalty. If both these contentions had been sustained, the total compensation would have been less than the actual value of the minerals required to be left unworked. The House of Lords repudiated the suggestion, that compensation in the Acts meant indemnity. And they refused to apply one

[1] 14 T. L. R. 550.
[2] 1906, 2 Ch. 138.
[3] Fullerton's Will, *sup.*
[4] *Ib.*
[5] See s. 6 of each Act; *ante*, pp. 371, 374.
[6] See Eden *v.* N. E. R. Co., 1907, A. C. 400. Cf. Rugby, &c., Co. *v.* L. & N. W. Ry. Co., 1908, 2 K. B. at pp. 614, 619.
[7] 1907, A. C. 400.

principle, where there was a fee simple interest only to be considered; and a different principle, when there were a lessee's interest and a reversioner's interest to be considered. It was accordingly held that the actual value was the proper measure of compensation; and that this amount was divisible between the lessee and the reversioner in accordance with their respective interests.[1]

Measure of compensation —physical conditions.

The physical conditions of the mine—for example, its position, its extent, and the difficulty of working it—are always, however, matters to be considered in measuring the compensation.[2]

Measure of compensation —possible or actual increase in value.

In measuring the compensation, the possible rise or fall of prices and wages ought to be considered.[3] And when coal rises in value subsequently to the date of the counter-notice, but before the compensation is assessed, the coal owner is entitled to have the fact of the rise taken into consideration.[4]

Measure of compensation —obligation to leave support.

In measuring the compensation the obligation (where it exists) to leave support ought, it is submitted, in every case to be considered. The question may arise under either a pre-existing or a co-existing right. *Wigan Corporation* v. *Wigan Canal, &c., Co.*,[5] was a decision to the contrary of the above submission. It was a case of a pre-existing right: it arose under the Wat. Cl. Act; and it adopted what was assumed to be the result of *Pountney* v. *Clayton*, a case under the Rail. Cl. Act.[6] There were, however, dicta in the opposite direction in the previous *Consett* case,[7] and the subsequent *New Moss* case,[8] both under the Wat. Cl. Act. And the distinction between the two Acts as regards a pre-existing right [9] (assuming that there is a distinction [10]) was not

[1] Reversing James Joicey & Co. and N. E. R. Co., 1907, 1 K. B. 402; and restoring the decision of Bigham, J., 1906, 1 K. B. 195. Cf. Rugby, &c., Co. *v.* L. & N. W. R. Co., 1908, 2 K. B. 606, cited, *ante*, p. 360.

[2] Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T. at 279; Eden *v.* N. E. R. Co., 1907, A. C. at 412.

[3] Bwllfa, &c. *v.* Pontypridd Wat. Co., 1903, A. C. 429, 431, 432.

[4] S. C. 426, reversing S. C. 1902, 2 K. B. 135, and restoring S. C. 1901, 2 K. B. 798. See also Richard and G. W. R. Co., 1905, 1 K. B. 68; Eden *v.* N. E. R. Co., 1907, A. C. 407, 408.

[5] 15 May, 1902, *per* Eady, J.

[6] 11 Q. B. D. 820; *ante*, pp. 399 *et seq.*

[7] See Consett Wat. Co. *v.* Ritson, 22 Q. B. D. 335, *per* Cave, J.

[8] See Manchester Corporation *v.* New Moss Colliery, 1906, 2 Ch. 572, *per* Vaughan Williams, L.J.

[9] See *ante*, pp. 395 *et seq.*

[10] See *ante*, p. 404.

established until the *New Moss* case. In *Edinburgh, &c.* v. *Clippens Oil Co.* (also under the Wat. Cl. Act)[1] it was intimated by Lord Robertson in the House of Lords,[2] that, when, as to a part of the support, there was an obligation to leave it under a co-existing right, that fact should be condered. And Lords Halsbury and Macnaghten appeared to be of the same opinion. As regards the Wat. Cl. Act it is, in these circumstances, submitted, that the question ought to be considered settled. It would make the result in the case of a counter-notice consistent with the result where there is no counter-notice;[3] and consistent also with *Smith* v. *Great Western Railway Co.*[4] As regards the Rail. Cl. Act, the position, it is submitted, depends upon whether there is in fact a distinction between the Acts, as to the right to work in the absence of a counter-notice.[5]

Measure of compensation —no market value.

Where the minerals in question have actually no value, there is no right to compensation. This can seldom happen in the case of a mineral like coal.[6] But it may so happen, if, through physical reasons, its working is impossible.[7] And it may easily happen in the case of other minerals, owing to the cost of carriage. Even, however, in such a case, it may be possible to utilise the mineral, and under such circumstances the profits which the owners would have so made may be taken into consideration, not as a measure, but as an indication, of its value.[8]

Measure of compensation —possibility of cesser of undertaking.

It need hardly be said, that the possibility of the railway or waterworks ceasing to exist is seldom a matter to be considered.[9]

Interest.

The mine owner is not entitled to interest for the time between the giving of the notice and the date of an award fixing the amount of the compensation. The position differs from that under some of the special Railway and Canal Acts.[10]

[1] 87 L. T. 275.

[2] See pp. 278, 279.

[3] See *ante*, 396, 397; *post*, p. 422.

[4] *Ante*, p. 411. Cf. Rugby, &c., Co. *v.* L. & N. W. R. Co., under a special Act: see the decision on the fourth point, *ante*, p. 360. Cf. also the law under Acts like the Dudley Canal Act, *ante*, pp. 354, 355.

[5] As to which see *ante*, pp. 395—404.

[6] See Rugby, &c., Co. *v.* L. & N. W. R. Co., 1908, 2 K. B. at 615; a case under a special Act (*ante*, p. 360).

[7] See Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T. at p. 279.

[8] See Rugby, &c., Co. *v.* L. & N. W. R. Co., *sup.* at pp. 615, 616.

[9] Eden *v.* N. E. R. Co., 1907, A. C. at pp. 411, 412.

[10] Richard and G. W. R. Co., 1905, 1 K. B. 68; cf. Fletcher *v.* L. & Y. R. Co., 1902, 1 Ch. 901, *ante*, p. 361.

How recoverable.

Where the parties do not agree as to the amount of compensation under section 78 of the Rail. Cl. Act, or section 22 of the Wat. Cl. Act, "the same shall be settled as in the other cases of disputed compensation." These words refer to the practice under the Lands Cl. Act as regards disputed compensation. If follows (1) that the claimant may have arbitration, or the verdict of a jury, at his option ; [1] and (2) that, if he has recourse to arbitration, and if the company refuse to take up the award, and furnish him with a copy, he may have a mandamus.[2] And, as regards the latter point, it is no answer on the part of the company to say, that they joined in the arbitration under protest, and that the arbitrator had no jurisdiction. If the arbitrator has no jurisdiction, this is a matter that can be raised in proceedings to enforce the award, but not on an application for a mandamus.[3]

Bond under Lds. Cl. Act.

The bond required to be given under section 85 of the Lands Cl. Cons. Act, 1845, by a company desirous of entering upon lands before agreement come to, award made, or verdict given, does not include within its condition compensation for minerals under sections 78 and 81 of the Rail. Cl. Act, or under sections 22 and 25 of the Wat. Cl. Act, but only the purchase-money for the lands taken, and compensation for the execution of the works.[4]

(δ) *Mining Communications and Damage by Severance.*

Mining communications under ss. 80 and 24 of respective Acts.

If the working of mines under a railway, or within the prescribed distance, is prevented by reason of apprehended injury to the railway, the owners, lessees, and occupiers of such mines, "and whose mines shall extend so as to lie on both sides of the railway," may, under section 80 of the Rail. Cl. Act, make such communications between such mines

[1] Under s. 68 of the Lds. Cl. Act: see R. *v.* L. & N. W. R. Co., 1894, 2 Q. B. 512. As to setting aside the verdict of a jury fixing the amount of compensation, see the Colonial case of Brown *v.* Comm. for Railways, 15 A. C. 240.

[2] Under s. 35 of the Lds. Cl. Act: see R. *v.* L. & N. W. R. Co., *sup.*

[3] L. & N. W. R. Co. *v.* Walker, 1900, A. C. 109. The matter was accordingly raised in proceedings to enforce the award, where it was held, that the arbitration and award were *ultra vires*, and that the mine owner was not entitled either to the sum awarded, or to the costs of the arbitration: see L. & N. W. R. Co. *v.* Walker, 1903, A. C. 289 ; *ante*, pp. 325, 326.

[4] *Ex parte* Neath and Brecon R. Co., 2 Ch. D. 201.

through the intervening mines as may be requisite to enable them to work them. But, under the same section, no such communication may be of greater dimensions than those prescribed. Nor may the same be cut or made upon any part of the railway or works, or so as to injure the same, or to impede the passage thereon.[1] Section 24 [2] of the Wat. Cl. Act is, in most respects, similar.

Necessary that communications should be under railway or waterworks.

It is necessary that the mining communications should be under the railway or waterworks. A mine owner will not be permitted to enter upon and across a line of railway, in order to reach and work his mines on the other side.[3] And it is immaterial, as in the case of clay and gypsum, that such mines can practically be worked only from the surface. But in neither case does he suffer loss. For he is entitled to damages under section 81; and he is so entitled, as well where he is obliged to work under disadvantages, as where he is prevented from working altogether.[4]

Necessary that mines should lie on both sides of railway—Mid. Rail. Co. *v.* Miles.

And it is essential, under section 80 of the Rail. Cl. Act, that the mines in question should "extend so as to lie on both sides of the railway." [5] In *Midland Railway Co.* v. *Miles* [6] a railway company, who afterwards became the plaintiff company, bought two pieces of land, without the mines; and on parts of such pieces of land they made two railways, railway A. to the left and railway B. to the right. Such pieces of land adjoined other land of the vendor lying to the right of railway B. Part of such pieces of land lay to the left of railway A., and became superfluous. The vendor afterwards sold to Clarkson so much of the land lying to the right of railway B. as immediately adjoined the railway. The defendant was the successor in title of the vendor. The defendant acquired the superfluous land to the left of railway A.; and he afterwards acquired a right of way over the land previously sold to Clarkson, for the purpose of working the minerals under the land between the

[1] *Ante*, p. 372.

[2] *Ante*, p. 376.

[3] Mid. R. Co. *v.* Miles, 30 Ch. D. 639, 640.

[4] *Ib.* 640, 641. See also *Re* Gerard and L. & N. W. R. Co., 1894, 2 Q. B. 921. It is not inconsistent with this result, that the mine owner may be entitled to work the same class of minerals under the railway by quarrying them: see, as to this, *post*, pp. 469, 470.

[5] There are no similar words in s. 24 of the Wat. Cl. Act.

[6] 30 Ch. D. 634; 33 *ib.* 632.

railways. Finally the plaintiff company paid for the mines under the sites of the railways. It was admitted, that, as the defendant was the owner of the mines on both sides of railway A., he was entitled to work the mines under the land between the railways by means of passages made under railway A.[1] But it was held, that, as he was not owner, lessee, or occupier on both sides of railway B., but had a mere right of way over the land previously sold to Clarkson, he was not entitled to work the mines under the land between the railways by means of passages made under railway B.[2]

Other mining communications—way of necessity.

And it was held that in the latter respect his position was not affected by the doctrine of a way of necessity. No right founded upon the doctrine could apply when the defendant's predecessor sold to the railway company; for it was then within his power to work the mines under the land between the railways by means of passages made under railway B. And any right founded upon the doctrine, when the defendant's predecessor sold to Clarkson, would be a right as between the defendant's predecessor and Clarkson, to which the railway company were no parties.[3] However, a mine owner who cannot resort, and never could have resorted to section 80 of the Rail. Cl. Act or section 24 of the Wat. Cl. Act; to enable him to work the mines in question; may be entitled to work them under the doctrine of a way of necessity. Thus the owner of ironstone or limestone, ordinarily got by surface operations, is entitled, if he is not compensated, to enter upon the surface of a railway and break it up, in order to reach and work the ironstone or limestone.[4] So, where the barrier, instead of being horizontal, is vertical. A mine owner may be entitled to pierce such a barrier to reach and work his mines.[5] And in either case it is immaterial that the barrier itself consists or partly consists of other mines which he has previously sold to the company.[6]

Damage by severance.

By section 81 of the Rail. Cl. Act the company are bound

[1] See 33 Ch. D. at pp. 643, 648, 649.

[2] *Ib.*, p. 649: see also L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 116, 117.

[3] 33 C. D. 644.

[4] See *post*, pp. 483 *et seq.*, where the law on this subject is discussed and stated.

[5] See *In re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 466, *per* Lord Esher; 471, *per* Rigby, L.J.

[6] See S. C. The barrier in question consisted of the minerals included in the notice to treat.

"from time to time" to pay "to the owner, lessee, or occupier of any such mines extending so as to lie on both sides of the railway, all such additional expenses and losses," as may be incurred by severance, or by interruption to, or interference with his working, and for any minerals not purchased by the company which he is prevented from working.[1] Section 25 of the Wat. Cl. Act contains somewhat similar provisions.[2]

Not a substitute for compensation.

Damages for severance are in addition to, and not in substitution for, the compensation provided by section 78 of the Rail. Cl. Act, and section 22 of the Wat. Cl. Act.[3]

When claimable.

The time when damages may be claimed has been already considered.[4]

Probable difference between earlier and later parts of each section.

It will be noticed that the earlier part of each of these sections is confined to mines "extending so as to lie on both sides"; resembling in this respect section 80 of the Rail. Cl. Act, and making, therefore, the decision in *Midland Railway Co.* v. *Miles*[5] applicable.[6] The later parts of sections 81 and 25 of the respective Acts apply to "any minerals not purchased."[7] But it is by no means certain that the words in the earlier part of each section do not govern the whole section.[8]

Circumstances under which claim may be made.

Damages for severance cannot, of course, be obtained, where the portion taken does not actually contain within itself the mining communication.[9] Such damages were claimed in *Midland Railway Co.* v. *Miles*,[10] the facts of which have been already stated.[11] It was there held, that the defendant was not debarred from working the mines under the land between the railways; and that he was not therefore entitled to damages upon that footing. He could not be so debarred, having regard to his right to work by means of passages made

[1] *Ante*, p. 372.

[2] *Ante*, p. 377. S. 25 also contains the words "or by reason of such apprehended injury from the working thereof as aforesaid": see as to the effect of this, *ante*, p. 390.

[3] See Eden *v.* N. E. R. Co., 1907, A. C. at 408.

[4] *Ante*, pp. 389 *et seq.*

[5] 33 Ch. D. 632: see *ante*, pp. 417, 418.

[6] See Holliday *v.* Wakefield, 20 Q. B. D. 710, *per* Cave, J.

[7] See *ib.* 710, 711, *per* Cave, J.

[8] Fry and Lopes, L.JJ., and Lord Bramwell thought that they did: see Holliday *v.* Wakefield, 20 Q. B. D. 717, 719, 1891, A. C. 88. Lord Esher thought that they did not: see 20 Q. B. D. 715. Lord Herschell thought it doubtful: see 1891, A. C. 105, 106.

[9] *Re* Huddersfield and Jacomb, 17 Eq. 476.

[10] 33 Ch. D. 632.

[11] *Ante*, pp. 417, 418.

under railway A. And the inability which his predecessor voluntarily came under, to work by means of passages made under railway B., could not alter his position to the disadvantage of the company. The company would otherwise be under an obligation, not merely to pay for mines, the working of which they stopped, but to pay for adjoining mines, which it was possible to work, and to the working of which they offered no objection. But it was held, that, if, through being obliged to work the mines in question by means of passages under railway A., he was put to any extra expense, he would be entitled to damages under section 81.[1]

How recoverable.

Where the parties do not agree as to the amount of losses or expenses under section 81 of the Rail. Cl. Act, or section 25 of the Wat. Cl. Act, "the same shall be settled by arbitration." The claimant has not, therefore, an option to have a jury, as under sections 78 and 22 of the respective Acts.[2] Where, however, he does not claim independently under section 81 or 25 of the Act in question, but his claim is merely consequential to a claim under section 78 or 22, he will be treated as proceeding under section 78 or 22; and his claim will accordingly be determinable under the Lands Cl. Act.[3]

Bond under Lands Cl. Act.

It has been already stated, that the bond required to be given under section 85 of the Lands Cl. Act does not include within its condition compensation under section 81 of the Rail. Cl. Act, or section 25 of the Wat. Cl. Act.[4]

S. 82 of Rail. Cl. Act.

There is no provision in the Wat. Cl. Act corresponding with section 82 [5] of the Rail. Cl. Act; and that provision is the only one in either Act which deals with the rights of, or gives compensation to, third parties. It provides, that, where mining communications may be made under section 80,[6] third parties are not to complain of any damage done to them thereby; and, on the other hand, are to receive full compensation.[7]

[1] See also s. c. 30 Ch. D. 640, 641, *per* Pearson, J.; *ante*, p. 417.

[2] See *ante*, p. 416: see R. *v.* L. & N. W. R. Co., 1894, 2 Q. B. 519, 520.

[3] See R. *v.* L. & N. W. R. Co., *sup.* 520, 521. As to the effect of including such claims as that in respect of a fire in the mine, see S. C. at p. 521.

[4] See *ante*, p. 416. As to "injurious affection," see further *ante*, pp. 167 *et seq.*

[5] *Ante*, pp. 373.

[6] See *ante*, pp. 416 *et seq.*

[7] As to s. 82, see *Re* Gerard *v.* L. & N. W. R. Co., 1894, 2 Q. B. 921; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at p. 117, *per* Moulton, L.J.

(ε) *Working in absence of Counter-notice.*

No obligation to give counter-notice.

There is no obligation on a railway or waterworks company, under sections 78, 79, 81, of the Rail. Cl. Act, or sections 22, 23, 25, of the Wat. Cl. Act, to give a counter-notice, and make compensation. They may, if they prefer, allow the working to proceed.[1] And if they determine to stop the working of any particular mines, and it is nevertheless possible to work the adjoining mines, it is only in respect of the mines the working of which they stop that compensation can be obtained. They are under no obligation to pay for adjoining mines, which it is possible to work, and to the working of which they offer no objection.[2] They may have to pay damages for severance in respect of such adjoining mines under section 81 of the Rail. Cl. Act, or section 25 of the Wat. Cl. Act. But the provisions for this purpose have a wholly different object; and the amount recoverable thereunder is usually much smaller.[3]

Power to work under Rail. Cl. Act.

The mine owner's power to work under the Rail. Cl. Act, in default of a counter-notice, is given by section 79. This section provides [4] that it shall be lawful "to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate;" [5] and it also provides for making good damage caused by "improper" working.[6] The mine owner may under this provision work the subjacent or lateral minerals by underground workings; although he

[1] Mid. R. Co. *v.* Miles, 30 Ch. D. 638, 639; Holliday *v.* Wakefield, 1891, A. C. 87, 88, 97; *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 466, 467; Manchester Corporation *v.* New Moss Colliery, 1906, 2 Ch. 564: see also Clippens Oil Co. *v.* Edinburgh, &c., Trustees, 24 Scot. L. R. 398: cf. the position under Acts like the Dudley Canal Act, *ante*, p. 354. Cf. as to purchasing, *ante*, pp. 162—165.

[2] See Mid. R. Co. *v.* Miles, 33 Ch. D. 649—651.

[3] See *ib.*; see also *ante*, pp. 418, 420.

[4] See *ante*, p. 372.

[5] See G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 39, 42; Pountney *v.* Clayton, 11 Q. B. D. 835, 837, 844; Mid. R. Co. *v.* Miles, 30 Ch. D. 639, 33 *ib.* 646.

[6] See G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 39; Mid. R. Co. *v.* Robinson, 15 A. C. 27; Ruabon, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 436, 441.

thereby destroys the surface.[1] And according to the authorities, as they stand,[2] the fact, that a right of support existed prior to the statutory purchase, is immaterial. Reasons have already been given for the submission that the authorities are incorrect.[3] The burden of proof is, however, on the mine owner, to show that his workings are "proper, necessary, and usual."[4] It has been held,[5] that working by mining, instead of by quarrying, if done in good faith, is not inconsistent with the Act, although the latter was the usual mode. But this can hardly be correct.[6] A railway company cannot be compelled to reinstate a railway which has been destroyed by mining operations.[7] In one case the application for a mandamus was made by the actual mine owners who caused the destruction.[8]

Power to work under Wat. Cl. Act.

The corresponding power to work under the Wat. Cl. Act is given by section 23. This section provides,[9] that it shall be lawful "to work the said mines and to drain the same by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner;" and it also provides for making good damage caused by "unusual" working. The effect of this provision in remitting the parties to their common law position has been already considered.[10] The burden of proof is on the undertakers to show that a working is "unusual."[11] The position differs therefore from that under the Rail. Cl. Act.[12] And where it was shown, that it was usual in working other

[1] See Ruabon Brick, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 457, *per* Bowen, L.J.; 464—465, *per* Smith, L.J.; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 109, *per* Hardy, M.R.; 127, *per* Buckley, L.J.: see also R. *v.* G. W. R. Co., 62 L. J. Q. B. 572; and see N. B. R. Co. *v.* Budhill, 15 S. L. T. 223; affirmed S. C. 1909, S. C. 277, but reversed on another point in the House of Lords, *ante*, p. 50.

[2] See *ante*, pp. 399—404.

[3] See *ante*, pp. 404.

[4] See Edinburgh Trustees *v.* Clippens Oil Co., 25 R. 504, at p. 516. Cf. the position under the Wat. Cl. Act, *infra*.

[5] See N. B. R. Co. *v.* Budhill, 1909, S. C. 277.

[6] The case was reversed on another point in the House of Lords, *ante*, p. 50; cf. *post*, p. 471.

[7] R. *v.* G. W. R. Co., 62 L. J. Q. B. 572.

[8] *Ib.* The applicants were the plaintiffs in Ruabon, &c., Co. *v.* G. W. R. Co. The facts in the Ruabon case are stated, *post*, pp. 469, 470.

[9] See *ante*, p. 376.

[10] See *ante*, pp. 396—399.

[11] See Edinburgh Trustees *v.* Clippens Oil Co., 25 R. 504: see pp. 515—516.

[12] See *supra*.

minerals by long wall to remove the pillars, but nothing was shown as to the usage in working the particular mineral, it was held that the burden was not discharged.[1]

(ζ) *Right to inspect and other Safeguards.*

Right to inspect.

A company purchasing land under the Rail. Cl. Act may enter and inspect the mines, and make use of the mining machinery, for the purpose of ascertaining, whether, in their working, sufficient support is left for the railway.[2] And the Wat. Cl. Act contains provisions of a somewhat similar kind.[3] Railway or waterworks proprietors have no right to a general inspection of the plans of the workings.[4]

S. 85 of Rail. Cl. Act.

Under section 85 of the Rail. Cl. Act, if mines are worked contrary to the code, the railway company may compel the mine owner to take all necessary precautions for the protection of the railway.[5] This power completes the legislative scheme as regards railways.[6] There is no corresponding provision in the Wat. Cl. Act.

(η) *Section* 27, *Wat. Cl. Act.*

S. 27 of Wat. Cl. Act.

There is no provision in the Rail. Cl. Act corresponding with section 27 [7] of the Wat. Cl. Act. Under sections 78, 79,[8] of the Rail. Cl. Act and sections 22, 23,[9] of the Wat. Cl. Act, the mine owner has no power to compel the company to compensate him for the mines. His remedy, if they refuse to compensate, is to proceed to work his mines. In the case of a railway this is sufficient. For the only injury which can ensue is injury to the railway. But, in the case of waterworks, the result of the working may be not only to injure the waterworks, but to drown the mines. Section 27 of the Wat. Cl. Act was meant to meet this case. The effect of it is to preserve to the mine owner his common law right to an action, in case his

[1] Edinburgh Trustees *v.* Clippens Oil Co., *sup.*

[2] See 8 & 9 Vict. c. 20, ss. 83, 84, *ante*, p. 373; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 42.

[3] See s. 26; *ante*, p. 377.

[4] Eden *v.* N. E. R. Co., 1907, A. C. at pp. 409, 410.

[5] *Ante*, p. 373.

[6] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 118.

[7] *Ante*, p. 377.

[8] *Ante*, pp. 371, 372.

[9] *Ante*, pp. 375, 376.

mine is injured by the escape of the water ; [1] and to preclude waterworks undertakers from sheltering themselves behind the authority of the statute.[2] And if so, it may be, that the mine owner is not merely entitled to recover damages for the injury after it is done ; but that, in a proper case, he may have an injunction to restrain it.[3]

f. Limitations of Code and resulting Position.

Limitations of code.

The scope of the code,[4] and its limitations, are, of course, parts of the same subject-matter. But it has been found more convenient to deal separately with the limitations, and the resulting position.

Lands of waterworks undertakers on which reservoirs, &c., not constructed.

The code under the Wat. Cl. Act only applies to lands belonging to the undertakers, upon which reservoirs or buildings have been constructed ; or in which pipes have been laid. The common law right applies to the other lands of the undertakers.[5]

Position in default of counter-notice.

As already stated, the code has a partial effect only under the Wat. Cl. Act, where there has been a pre-existing right of support. In default of a counter-notice, the parties are remitted to their common law rights.[6] And, as already stated, it may be that the position is similar under the Rail. Cl. Act.[7]

Non-"minerals" inside prescribed distance.

The meanings of the words "mines" and "minerals" in the Acts have been already fully dealt with.[8] It is sufficient to say here, that the statutory meanings are narrower than the ordinary. As regards substances which (*a*) are not under the land purchased, (*b*) are inside the prescribed distance, and (*c*) are not "minerals," the common law right remains.[9] No

[1] As to this, see *post*, p. 517.

[2] See Holliday *v.* Wakefield, 1891, A. C. 87, 88, *per* Lord Bramwell, 90, *per* Lord Halsbury, 101, *per* Lord Watson, 103, *per* Lord Herschell ; Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. 293, 294, *per* Farwell, J.

[3] See Holliday *v.* Wakefield, *sup.* 89, *per* Lord Bramwell ; see also 20 Q. B. D. 708, *per* Mathew, J. See, however, 1891, A. C. 101, *per* Lord Watson, who thought that the undertakers might pay damages, if they "preferred not to remove the nuisance." See also the provisions as to the security of reservoirs contained in 26 & 27 Vict. c. 93, ss. 3—10.

[4] See *ante*, pp. 392 *et seq.*

[5] See New Moss Coll. *v.* Manchester Corporation, 1908, A. C. 124, *per* Lord Atkinson.

[6] See *ante*, pp. 396—399.

[7] See *ante*, pp. 399—404.

[8] *Ante*, pp. 43 *et seq.*

[9] See L. & N. W. R. Co. *v.* Ackroyd, 31 L. J. Ch. 590, *per* Wood, V.-C. ; L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 110, 120, 128, *per* Hardy, M.R., and Moulton and Buckley, L.JJ.

notice under the Acts is therefore required ;[1] and no counter-notice is effective. This position may cause embarrassment to railway and waterworks companies ; as pointed out by Lord Macnaghten in *Glasgow* v. *Farie*, and by Lord Herschell in *Midland Railway Co.* v. *Robinson*, in passages already referred to.[2] But it does not leave them helpless. The extent to which the landowner may work without infringing the common law right, of course depends upon the facts in the particular case.[3]

Workings which only affect overlying mine inside prescribed distance.

It has been suggested, that where workings inside the prescribed distance would let down an overlying mine belonging to a railway company, without letting down the surface, the railway company could rely upon the common law right. The protection afforded . . . is a protection of the surface and not a protection of subjacent strata. . . . Section 78 . . . applies, not as a protection to the strata, but as a protection to the surface.[4]

"Minerals" and non-"minerals" outside prescribed distance.

As regards all substances, whether "minerals," or not, outside the prescribed distance, the common law right also remains.

Dicta prior to Howley Park case.

Prior to *London and North Western Railway Co.* v. *Howley Park, &c., Co.*[5] the dicta on the subject were not uniform ; and some of them were obscure. In *Pountney* v. *Clayton*,[6] Denman, J., thought that the common law position applied. Bowen, L.J., in the same case[7] used observations which left his views doubtful. In *Midland Railway Co.* v. *Miles*,[8] Pearson, J., said that the provisions as to mining communications in section 80 of the Rail. Cl. Act applied to mines outside the prescribed distance ; basing himself upon the generality of the words in the heading to the sections—"And, with respect to mines lying under or near the railway, be it enacted."[9] In *North British Railway Co.* v. *Turners*,[10] Lord Pearson

[1] L. & N. W. R. Co. *v.* Howley Park, &c., Co., *sup.*, 120.

[2] See Glasgow *v.* Farie, 15 A. C. at p. 698, *per* Lord Macnaghten, referred to, *ante*, p. 39 ; Mid. R. Co. *v.* Robinson, 15 A. C. at pp. 29, 30, *per* Lord Herschell, referred to *ante*, p. 36.

[3] See Todd, &c. *v.* N. E. R. Co., 1903, 1 K. B. 609, 610, *per* Lord Alverstone.

[4] L. & N. W. R. Co. *v.* Howley Park, &c., Co., *sup.*, 132, *per* Buckley, L.J.

[5] 1911, 2 Ch. 87.

[6] 11 Q. B. D. at pp. 826, 828.

[7] *Ib.*, p. 842.

[8] 30 Ch. D. 640.

[9] See *ante*, p. 371.

[10] 6 F. 906, 908.

suggested that the common law position applied. In the *New Moss* case, although it turned upon the fact of the pre-existing right,[1] the observations of Hardy, L.J.,[2] which were expressly approved in the House of Lords,[3] tended [4] in the same direction.[5]

L. & N. W. Rail. Co. *v.* Howley Park, &c., Co.

In *London and North Western Railway Co.* v. *Howley Park, &c., Co.*[6] the defendants were the lessees of minerals lying outside the prescribed distance, which they held from the successors in title from the vendor to the railway company. It was held that railway companies were entitled to the common law right of lateral support for their railway from such minerals.[7] It was admitted, that, outside that distance no statutory notice could be given, and no counter-notice could be given; and it was held that the common law right was only taken away to the extent to which the notice and counter-notice could relate.[8] The other material parts of the judgment have been already cited.[9]

Other questions dealt with as to position outside prescribed distance.

The principle of the *Howley Park* case applies to non-"minerals," as well as "minerals," outside the prescribed distance.[10] It also applies as between superjacent mines belonging to a railway company and lying outside the prescribed distance, on the one hand; and the subjacent or lateral mines of a mine owner on the other hand.[11] In the same case Moulton, L.J., expressly disapproved of the view taken by Pearson, J., in *Midland Railway Co.* v. *Miles*, already referred to.[12] The Lord Justice stated that the word "near," which occurs in the heading to the section, and on which Pearson, J., based himself, is defined by the clauses to which it relates; and that the code was confined under section 80, as well as elsewhere, to minerals within the prescribed distance.[13] The results outside the prescribed distance involve no hardship upon the mine owner, if he is also, or claims under, the vendor

[1] See *ante*, p. 396.

[2] 1906, 2 Ch. 576—577.

[3] 1908, A. C. 121.

[4] His Lordship has himself said that they were not decisive: L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at 110.

[5] Perhaps the statements of Lord Selborne in Dixon *v.* Cal. R. Co., 5 A. C. at 828 and 829 also tended in the same direction.

[6] 1911, 2 Ch. 97.

[7] Reversing the decision on this point of Eve, J.

[8] See p. 110, *per* Hardy, M.R.: see also pp. 126—127, *per* Buckley, L.J.

[9] *Ante*, pp. 382, 384, 392, 394, 401.

[10] See p. 110, *per* Hardy, M.R.

[11] See p. 119, *per* Moulton, L.J.

[12] *Ante*, p. 425.

[13] See 1911, 2 Ch. 118, 119.

to the railway company. He can be compensated for at once; *i.e.* under the notice to treat.[1] If he does not claim it, he has himself to blame.[2]

Application of principle to Wat. Cl. Act.

Of course the principle of the *Howley Park* case applies under the Wat. Cl. Act.

Effect when mine owner not vendor to rail. co.

Buckley, L.J., in the *Howley Park* case pointed out the importance of the fact that "the owner of the surface and the owner of the minerals were the same persons."[3] It is submitted, however, that there is nothing in that case to confine its principle to cases where the mine owner is also, or claims under, the vendor to the railway company; and that the principle equally applies where the mine owner is a stranger in title. There may be a difficulty in claiming compensation in the latter case for the obligation to leave support for any extra burdens put upon the surface by the railway company. But perhaps, as in the case of a reversioner,[4] resort may be had to s. 6 of the Act.[5]

S. 27 of Wat. Cl. Act.

It was apparently stated in the House of Lords,[6] that mines outside the prescribed distance are within section 27 of the Wat. Cl. Act.[7] But the only result is that the common law right in respect of an escape of water applies both inside and outside.

Superfluous land.

As already stated, *Pountney* v. *Clayton*[8] decided (1) that a pre-existing right of support did not pass to a railway company, and (2) that the railway company could not give to the purchaser of superfluous land any greater right than they themselves possessed. It has been already suggested that the decision upon the first point is not correct.[9] As regards the second point the power of a railway company appears to be even smaller than it was said or assumed to be in *Pountney* v. *Clayton*. It was said in the *Howley Park* case that the statutory privilege which a railway company admittedly possess of stopping a working "inside the prescribed distance, on giving compensation, is one which they could not pass on to their purchasers.[10]

[1] See L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. at 130, *per* Buckley, L.J. Cf. *ante*, p. 389.

[2] Cf. the position referred to, *ante*, p. 353.

[3] See 1911, 2 Ch. at p. 131: see also p. 130.

[4] See *ante*, p. 411.

[5] *Ante*, p. 371. Cf. the suggested position under special Rail. and Canal Acts, *ante*, pp. 352, 353.

[6] See Holliday *v.* Wakefield, 1891, A. C. 101, *per* Lord Watson.

[7] See *ante*, p. 377.

[8] 11 Q. B. D. 820.

[9] *Ante*, p. 404.

[10] 1911, 2 Ch. at pp. 121—122, *per* Moulton, L.J.

Co-existing common law right.

Waterworks proprietors, entitled to resort to the code as to a part of their property may have a common law right as to the remainder. They may, for example, have a common law right of support as to one of their pipes, while the code applies to the remainder.[1] So the common law right applies to lands belonging to them, upon which reservoirs or buildings have not been constructed, or in which pipes have not been laid; while the code may apply to their remaining lands.[2] And where, as sometimes happens, the mine owner cannot, on his part, resort to the code without infringing the common law right of the railway or waterworks proprietors, he either cannot obtain compensation at all, or can only obtain so much as is attributable to the mines not subject to such right.[3] Attention has already been drawn to the possibility of a railway company claiming protection for an overlying mine belonging to them; and which would be let down by threatened workings, without letting down their surface.[4]

g. Purchases.

Nature and extent of power.

The nature and extent of the power of a railway or waterworks company to purchase mines have been already stated.[5]

No obligation to purchase.

And, as has been already seen, there is no obligation on a railway or waterworks company to purchase mines. They may, if they prefer, allow the working to proceed.[6]

h. Pub. Health Act, 1883.

Generally.

The decisions in *In re Dudley*,[7] and similar cases,[8] under the Pub. Health Act, 1875, and the Gas Cl. Act, led to great practical inconvenience; and the Acts were altered by the Pub. Health Act, 1875 (Support of Sewers), Amendment Act, 1883; the provisions of which have been already stated.[9] The title of this Act is ill chosen, and many of its provisions are ill drawn. This is the more regrettable, because it is an Act

[1] See Edinburgh, &c., Trustees *v.* Clippens Oil Co., 87 L. T. 275.

[2] See New Moss Coll. *v.* Manchester Corporation, 1908, A. C. 124, *per* Lord Atkinson.

[3] See Edinburgh Trustees *v.* Clippens Oil Co., 87 L. T. 275.

[4] *Ante*, p. 425

[5] *Ante*, pp. 161 *et seq.*

[6] See *ante*, p. 165. Cf. as to making compensation, *ante*, pp. 421 *et seq.*

[7] 8 Q. B. D. 86, *ante*, p. 349.

[8] See *ante*, pp. 349, 350.

[9] *Ante*, pp. 377—379.

of growing importance, in proportion to the growing "sanitary" requirements of the community.

Scope of Act.

Notwithstanding its title, the Act is not confined to sewers.

Section 2 defines "sanitary work" as meaning any existing or future building or work constructed by or vested in or under the control of a local authority, under the powers or for the purposes of so much of the principal Act (*i.e.* the Public Health Act, 1875), or of any general or local Act or Provisional Order, as relates to the construction or maintenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and including any fixtures, pipes, fittings, or apparatus connected with any such work, and belonging to or used by the local authority; and "Sanitary Act" as meaning the Act or Provisional Order, under the authority of which a sanitary work has been or is constructed, or is maintained, whether such Act or Order was passed and confirmed before or after the commencement of the Act of 1883.[1] Which is the "Sanitary Act" intended to be referred to in any particular case is a question which depends upon whether, when the works were executed, the Public Health Act, 1875, was in force, or the earlier Acts which that Act superseded.[2]

Incorporation of "code" in Wat. Cl. Act.

Section 3 incorporates, with modifications, the provisions of the Wat. Cl. Act with respect to mines;[3] and with them, of course, the principle of deferred rights, which is the basis of the code.[4]

Mines outside prescribed distance.

One of these modifications is contained in sub-section 2 of section 3 which provides that the local authority may specify and define the nature and extent of support which they require to be left, and that their notice for that purpose may extend to minerals beyond the forty yards limit, or to such less distance as they think fit. There is, therefore, an important difference in this respect between this Act and the Rail. and Wat. Cl. Acts.[5]

Deposit of plans.

Another of such modifications is contained in sub-section 3, which (except so far as that enactment is saved by section 5 [6])

[1] See *ante*, p. 378.

[2] See Jary *v.* Barnsley Corporation, 1907, 2 Ch. at p. 614.

[3] See *ante*, pp. 378, 379.

[4] See *ante*, p. 389: and see Jary *v.* Barnsley Corporation, 1907, 2 Ch. 615.

[5] See *ante*, pp. 425—427. See Manchester Corporation *v.* New Moss Colliery, 1906, 1 Ch. at 299.

[6] As to which, see *post*, p. 431.

makes, as regards existing sanitary works, the deposit of plans within twelve months, a condition precedent to the right of a local authority to recover for injury from subsidence.[1]

Land not vested in Local Authority or dedicated to public.

The last part of section 3 provides, that the Act shall apply to every "sanitary work," whether the land on, in, over, or under it is or is not vested in or occupied by the local authority; or is or is not dedicated to the public.[2] The difficulty of ascertaining the object of this provision is not lessened by the position in which it is placed. It has been suggested, that the probable object was to protect owners of mines under roads vested in urban authorities under section 149 of the Act of 1875.[3]

Limitation of right of support.

Section 4 provides, that "except as in this Act provided," a local authority shall not "by reason only of anything contained in the Sanitary Act," be deemed to have acquired or to be entitled to or to be bound to acquire or make compensation for any right of support for such sanitary work.[4] Whatever be the meaning of the words "except as in this Act provided," it has been held [5] that they include a reference to the saving provisions in section 5.[6]

General effect of ss. 2–4.

The general effect of the foregoing provisions is to place "sanitary work" on a similar footing to railways and waterworks constructed under the Rail. and Wat. Cl. Acts; and therefore to negative the application of the doctrine of implied grant,[7] and to substitute the principle of the code.[8] It follows, that the mine owner is bound, before working his subjacent, and probably also his lateral, mines, to give notice to the local authority; [9] and that the other code rules thereupon also apply.[10]

Retrospective effect.

To some extent, at all events, the Act has a retrospective effect. This is clear from the definitions of "sanitary work" and "Sanitary Act;" and from the language of sub-section 3

[1] See South Staffordshire, &c., Co. *v.* Mason, 56 L. J. Q. B. 255, and *ante*, p. 388.

[2] See *ante*, p. 379.

[3] See Lumley's Public Health (7th ed.), p. 736.

[4] See *ante*, p. 379.

[5] Jary *v.* Barnsley Corporation, 1907, 2 Ch. 615, 616.

[6] As to which, see *infra*.

[7] See *ante*, pp. 380 *et seq.*

[8] See Jary *v.* Barnsley Corporation, 1907, 2 Ch. 615.

[9] *Ib.* As to notices, see *ante*, pp. 405—407.

[10] See *ante*, pp. 405 *et seq.*

of section 3, and of section 4.[1] The extent of the retrospective effect depends upon sections 4 and 5.

Savings from Act.

Section 5 provides (1) that the Act shall not be construed to repeal, invalidate or affect any express enactment in a sanitary or other Act or any existing agreement, with respect to support, or to affect any concluded or pending legal proceedings; and (2) that when "any right of support has been acquired before the passing of the Act. . . . and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired, or operate to deprive the local authority of such right or to entitle any person to any compensation in respect thereof to which such person would not have been entitled if this Act had not been passed." [2]

Jary *v.* Barnsley Corpn.—second provision of s. 5.

In *Jary* v. *Barnsley Corporation*,[3] certain lands, excepting the mines thereunder, were conveyed to the corporation for the purposes of their works; the compensation money having been previously assessed and paid under the sanitary Act applicable thereto. The corporation constructed an outfall sewer through certain other lands of the same land owner. Before constructing the sewer, they had under the Pub. Health Act, 1875, given notice of their intention; and the landowner had under the same Act claimed compensation; and the matter had been referred to arbitration; and the umpire had awarded compensation; and there was no evidence [4] that he had not in so doing taken into consideration the fact that the Act had conferred the right of support.[5] The conveyance was executed, and the sewer constructed, before the Act of 1883 came into force. It was held, that the second provision of section 5 of the Act of 1883 applied; and that the provisions of sections 2, 3, and 4 did not therefore, either as regards the works contemplated by the conveyance, or as regards the sewer, operate to deprive the corporation of their existing rights of support.

When compensation recoverable at passing of Act of 1883.

The second provision of section 5 is confined to cases in which "no compensation is at the passing of this Act

[1] See Jary *v.* Barnsley Corporation, 1907, 2 Ch. 614, 615, 618.

[2] See *ante*, p. 379.

[3] 1907, 2 Ch. 600.

[4] See, as to this, *ante*, p. 351.

[5] See *ante*, p. 349.

recoverable in respect of such right." These words apply when a corporation (as they had power to do) laid a sewer without making compensation, and the question as to the compensation was deferred.[1] And, if the Act of 1875 conferred a right of lateral, as well as subjacent support, and did so whether the lateral mines did or did not belong to the owner of the land in which a sewer was laid ;[2] and the lateral owner left the question of compensation open ; the words in question also apply.[3] There are or may be therefore two classes of cases in which the second provision of section 5 cannot apply ; and in which the Act of 1883 may therefore apply retrospectively under section 4.[4]

First provision of s. 5.

No opinion was expressed in *Jary* v. *Barnsley Corporation* as to the effect of the first provision of section 5.[5]

Enjoyment of support for twenty years since Act immaterial.

An enjoyment for twenty years partly before and partly since the passing of the Act ; or an enjoyment for twenty years since the passing of the Act ; does not create a right to its continuance ; the position of the parties being regulated by the Act.[6]

Position of reversioner.

A reversioner to whom the Act applies is not in the same position as regards compensation as he would be under the Rail. or Wat. Cl. Acts.[7] Section 6 of the Wat. Cl. Act is not incorporated with the Pub. Health Act, 1883 ; and, whether a reversioner has a remedy of any kind is, to say the least, doubtful.[8]

i. Local Government Act, 1894—*Small Holdings and Allotments Act,* 1908—*Housing, Town Planning, &c., Act,* 1909.

Local Government Act, 1904.

The Loc. Gov. Act, 1894, provides that "any order made under this section for the purpose of the purchase of land otherwise than by agreement shall incorporate the Lands Clauses Acts, and sections 77 to 85 of the Rail. Cl. Act, 1845,

[1] See Jary *v.* Barnsley Corporation, 1907, 2 Ch. at pp. 618, 619 : see *ante*, p. 353.

[2] See *ante*, p. 349.

[3] See Jary *v.* Barnsley Corporation, *sup.* at 619.

[4] See *ib.*

[5] See *ib.*

[6] See *ante*, p. 388.

[7] As to which, see *ante*, p. 411.

[8] In G. W. R. Co. *v.* Smith, 2 Ch. D. 254, Baggallay, L.J., suggested that possibly a remedy might also have been available under s. 81 of the Rail. Cl. Act.

with the necessary adaptations," subject to a modification which deals with questions of disputed compensation.[1]

Small Holdings and Allotments Act, 1908.

The Small Holdings and Allotments Act, 1908, provides, that an order under the Act for the compulsory acquisition of land shall incorporate, "subject to the necessary adaptations," sections 77 to 85 of the Rail. Cl. Act, 1845, subject to a similar modification.[2] It also provides, that an order under the Act as to the compulsory hiring of land shall incorporate such provisions of sections 77 to 85 of the Rail. Cl. Act, 1845, as may, subject to "the prescribed adaptations," appear necessary or expedient; but shall not, except with the consent of the landlord, confer on the council any right to take, sell, or carry away any minerals, gravel, sand or clay, except so far as may be necessary or convenient for the purpose of erecting buildings on the land, or otherwise adapting it for small holdings or allotments, and except upon payment of compensation.[3]

Housing, Town Planning, &c., Act, 1909.

The Housing, Town Planning, &c., Act, 1909, contains provisions for the compulsory acquisition of land similar to those contained in the Sm. H. and Allot. Act, 1908; with a further provision for incorporating the sections of the Sc. Rail. Cl., which correspond with sections 77 to 85 of the Rail. Cl. Act, 1845.[4]

Observations on these Acts —position of reversioner.

These incorporations, at all events so far as regards compulsory acquisition, will probably lead to difficulties. There is little or no comparison between a long and narrow strip on which a railway line is usually laid, and an area, usually neither long nor narrow, which is suitable for "local government" purposes; or for small holdings or allotments; or for housing or town planning. How can provisions as to the "prescribed distance"[5] under the Rail. Cl. Act be satisfactorily "adapted." The Acts, moreover, omit to incorporate section 6 of the Rail. Cl. Act. The position as regards a reversioner is therefore open to an observation similar to that already made as regards the Pub. Health Act, 1883.[6] So far as regards compulsory hiring under the Act of 1908, the position is more elastic.

[1] S. 9 (10).

[2] S. 39 and Part I. of First Sched.

[3] S. 39 and Part II. of First Sched. The Act repealed the S. H. & A. Act, 1907, which contained similar provisions.

[4] S. 2 and First Sched.

[5] See s. 78, cited, *ante*, pp. 371.

[6] See *ante*, p. 432.

PART E.—BRINE-PUMPING.

(*a*) *Generally.*

Mode of obtaining salt—effect upon surface.

Salt is sometimes obtained by dry mining; a shaft being sunk, as in the case of ordinary mining, to the bed of salt; and the salt being sent to the surface for subsequent treatment.[1] It is usually, however, obtained by brine-pumping. And it is usually [2] so obtained under the following conditions, in the following modes; and, so far as respects the neighbouring landowner, with the following results: (1) Where, owing to the looseness of the soil, water percolates freely, the pumper sinks and pumps in his own land, and confines his operations to so doing. As the result, water percolating naturally in his neighbour's land, and charged with salt, is drained into the pumper's land, and appropriated by him. (2) Where, owing to the rocky nature of the soil, there is little, if any, percolating water, the pumper sinks through the rock in his own land, and sends water down the hole. The water so sent down spreads into his neighbour's land, and acts upon the salt in the same manner as in the case of the naturally percolating water. The pumper then pumps; and a result follows similar to that in the first mode. In the salt districts these operations are conducted upon a large scale; and large quantities of salt are in consequence dislodged from land without the consent of the landowners. When the first mode of pumping is adopted, surface subsidences ensue of a most destructive kind. When the second is adopted, surface subsidences may also ensue; but, from the nature of the soil, produce far less damage.

Position independently of Act of 1891.

Although brine is little distinguishable from water, it is in fact distinguishable; and, when its withdrawal causes subsidence, the surface owner is, in theory at all events, entitled to a remedy.[3] In the great majority of cases, however, it is not one person only who is operating. Several persons are usually operating at the same time in different places adjoining the surface in question; and it is usually difficult, if not

[1] See Salt Union, &c. *v.* Brunner, Mond, &c., 1906, 2 K. B. 823.

[2] But not always: see S. C.

[3] See *ante*, pp. 291, 298, 299. As to the right of support from water itself, see *post*, pp. 438 *et seq.*

impossible, to prove that the dislodgment of the salt is due to the acts of any one (rather than another) of such persons.

This state of things led to the passing of the Brine-Pumping (Compensation for Subsidence) Act, 1891.[1] Under this Act the districts, in respect of which its provisions are applied, become subject to a special law, by which compensation for subsidence is provided; and which will be presently mentioned.[2] Act of 1891.

The Act expressly provides that certain specified bodies and persons (including brine-pumpers themselves [3]) shall not claim compensation thereunder; and such bodies and persons accordingly remain subject to the general law.[4] Brine-pumpers and landowners in other districts also remain subject to the general law. Cases not within Act.

(β) *Brine-Pumping (Compensation for Subsidence) Act*, 1891.[5]

Any "owner" (by which is meant the person for the time being receiving the rack rent, or who would receive it if the land were let at a rack rent [6]) or "owners" of land in any county of an aggregate rateable value of not less than 2,000*l.*, and any sanitary authority in any county, may apply to the Local Government Board to have a compensation district formed.[7] If the Board think that a sufficient *primâ facie* case is made out, they may direct a local inquiry to be held by an inspector; [8] and if, after receiving his report, they determine to form a compensation district, they frame a provisional order to that effect, and deposit copies of it, and advertise it in the district.[9] The provisional order requires to be confirmed by Parliament; and if, while the bill for that purpose is pending, a petition is presented against the order, it may be referred to a select committee, and the petitioner may appear and oppose as in the case of a private bill.[10] Formation of compensation district.

For every compensation district the Act provides for the Compensation Board.

[1] See Salt Union, &c. *v.* Brunner, Mond, &c., 1906, 2 K. B. 832.

[2] See *infra*.

[3] See *post*, p. 438.

[4] See Salt Union, &c. *v.* Brunner, Mond, &c., 1906, 2 K. B. 822.

[5] 54 & 55 Vict. c. 40.

[6] S. 52.

[7] S. 3.

[8] S. 4. As to the procedure on the inquiry, see ss. 5, 45.

[9] S. 6.

[10] S. 7. As to altering the boundaries of a compensation district, see s. 8.

establishment of a compensation board.[1] The compensation board is a body corporate.[2] One-third consists of persons (not being brine-pumpers, or persons employed by them for the purposes of their business) appointed by the county council; one-third of persons elected by the brine-pumpers; and one-third of persons (not being brine-pumpers or persons employed by them for the purposes of their business) appointed by the local sanitary authority. And the Local Government Board fix their number, their mode of election, and other similar matters.[3]

Compensation fund.

The compensation board is required to maintain a compensation fund for their district.[4] The fund is to be formed by a rate [5] levied on all the brine-pumpers in the district [6] of such amount (not exceeding in the aggregate in any period of twelve months threepence per thousand gallons of brine pumped in the district [7]) as the compensation board may consider sufficient to meet the claims for compensation under the Act, the expenses of the board, and the formation (if thought desirable) of a reserve fund to meet exceptional claims, or provide for deficiencies.[8]

What damage may be compensated for.

The damage, for which compensation may be made under the Act, is damage of the following kinds only, arising from subsidence which has happened after the passing of the Act:—

(1) Depreciation of land (not including any erection or works on or under the land except as below mentioned) subsiding or becoming permanently submerged, including any necessary expense of fencing.

(2) Destruction or structural damage of buildings, and walls of all kinds, but not including damage to machinery or fixtures, whether removable or not;

(3) The proper and necessary expense of building retaining

[1] S. 9.

[2] S. 10. As to the dissolution of the compensation board, see s. 49.

[3] S. 11. As to their meetings and proceedings, committees, surveyors and other officers, see ss. 12—19, and schedule; as to investment of monies, see s. 20; as to auditing accounts, see s. 46; and as to bye-laws, s. 48.

[4] S. 21.

[5] S. 21. As to the mode of assessing and recovering the rate, and computing the quantity of brine pumped, see ss. 36, 39—41, 43; and as to appeals from the rate, see s. 42.

[6] S. 37.

[7] S. 38.

[8] S. 36. As to the reserve fund, see s. 44.

walls, or bolting together, underpinning, or otherwise supporting, raising, or repairing buildings and walls ;

(4) The proper and necessary expense of altering the approaches to or the levels of lands or buildings ;

(5) The proper and necessary expense of raising, lowering, diverting, or making good private roads, bridges, fences, sewers, or drains.[1]

No claim can, however, be made by any person, unless he has such title to or interest in the property damaged, as would entitle him to recover, if the damage had been caused by the wrongful excavation by any other person of strata underlying or supporting such property ; and the compensation is not to exceed the actual loss sustained or the expense necessary to make good the damage.[2] The board may also contribute towards the extra cost of building, rebuilding, or replacing any existing or future building within its district on some system or style of building, whereby it can conveniently be raised, and may provide plans and models of buildings recommended as suitable for the purpose aforesaid.[3]

Claim for compensation.

In order to make a claim for compensation under the Act, it is necessary to allege :—

(1) That damage as above mentioned has been caused to some property by subsidence of the same or other land resulting from brine-pumping, and subsequent to the passing of the Act ; and

(2) That the claimant has such title to or interest in the property so damaged, or some part thereof, as would entitle him to recover if the damage had been caused by wrongful excavation by any other person of strata underlying or supporting such property.[4]

And notice in writing of the damage must be given to the board, or, if none, the local sanitary authority within six months after it becomes apparent.[5]

Regulations as to claims.

The form, time, and manner of claims may be prescribed by regulations ; and once or oftener in each year the board are to advertise a time for sending in claims.[6]

Notice and adjudication of claims.

Notice of claims is given by the board to the brine-pumpers,

[1] S. 22.
[2] *Ib.*
[3] *Ib.*
[4] S. 23 (1).
[5] *Ib.*
[6] S. 23 (2), (3).

and the date of adjudication is advertised in some local newspaper. The claims are then adjudicated upon, or by agreement with the claimants may be referred to arbitration.[1]

Power of inspection. Surveyors authorised by the board may inspect premises which are in question under the Act.[2]

Application of compensation. The board may require the compensation to be expended in filling up holes in the lands injured, or in restoring buildings.[3]

Power to purchase lands. The board have large powers to purchase, sell, and otherwise deal with lands; and to pull down buildings.[4]

Register. The board are required to keep a register of lands injured, and of lands sold by the board subject to restrictive conditions, together with maps; and such books and maps are open to inspection.[5]

Who cannot claim compensation. Compensation under the Act cannot be claimed by:—

(1) A railway or canal company, except in respect of property not connected with the railway or canal;

(2) A gas or water company;

(3) A county council or municipal corporation;

(4) A sanitary, highway, or other local authority;

(5) A brine-pumper;

(6) An owner of land receiving brine rents, or salt royalties or other similar remuneration;

(7) Owners or occupiers of salt or alkali works;

(8) The trustees of the River Weaver Navigation.[6]

Restriction of actions. Except as provided by the Act no action or proceedings may be commenced in respect of any damage for which compensation has been claimed under the Act.[7]

PART F.—SUPPORT FROM WATER.

Generally. It has been already stated that, where a right of support exists, degrees cannot be measured out to which the right will extend. The right reaches over a greater or less area according to the stability of the substance giving the support.[8] But whether

[1] S. 23 (4), (5). As to the mode of dealing with claims, and the recovery of sums awarded, see ss. 24, 25, 26. Appeals lie to the County Courts (s. 27), and special cases may be stated (s. 28); but there can be no appeal or special case where the amount claimed does not exceed 100*l.* (s. 29).

[2] S. 47.

[3] S. 30.

[4] Ss. 31, 32, 33.

[5] S. 34.

[6] S. 50.

[7] *Ib.*

[8] *Ante*, pp. 291, 292.

and to what extent the principle of the right applies to the extreme case of support from water are questions of equal importance and difficulty. The cases in which the question of water support has been raised are few, and will now be stated.

Elliot v. N. E. Rail. Co.

In *Elliot* v. *North Eastern Railway Co.*[1] there was at the time of the purchase of land by a company for the purpose of erecting a railway, underneath the land purchased, and also underneath some adjoining land of the vendor, an old mine which had been drowned for more than forty years. The drowning was due to the accidental overflowing of a neighbouring river. The water stood eighty fathoms deep in a perpendicular shaft in the mine, and from this shaft ran horizontally several passages, which were filled with water. On the surface of the purchased land the company constructed a portion of their works. Vertical support to the land so burdened was in part given by the hydrostatic pressure of the water in the shaft, and was also in part given by the water in the horizontal passages. The mine owner gave the company notice of his intention to work the mine, and for that purpose to pump out the water in the shaft and passages. The Court held that the company had no right to prevent the mine owner from withdrawing the water.[2] The circumstance of the water being in the shaft and passages was purely accidental, and one which the company might have known there was every probability of the mine owner altering.

Popplewell v. Hodkinson.

In *Popplewell* v. *Hodkinson*,[3] a conveyance of land in Manchester contained a covenant by the grantee to build. The land was wet and spongy. The plaintiff (who claimed under the grantee) built cottages; but he did not drain the land, so as to make it more suitable to bear the cottages. Subsequently the adjoining land (the title to which was derived from the same grantor) became vested in persons who employed the defendant to build a church. With a view to effectually draining, and thereby securing a good foundation, the defendant excavated deeply. The plaintiff's land was in consequence drained: it subsided; and the cottages were injured. The

[1] 10 H. L. C. 333: see *ante*, p. 347.

[2] Varying the order of V.-C. Wood (1 J. & H. 145), as affirmed by Lord Campbell (2 De G. F. & J. 423), according to which the mine owner was at liberty to drain the water from the shaft, but not from the passages.

[3] L. R. 4 Ex. 248.

Court considered that, the adjoining land being close to a large city, the plaintiff's predecessor should have had strong grounds for supposing that it would be built upon; and would, if necessary, be drained. It moreover considered that the plaintiff was guilty of neglect in not draining his own land. It was therefore held that the plaintiff was without a remedy. It was at the same time intimated, that where an owner of land has obtained a grant for a particular object, and there are no exceptional circumstances in the case, he may properly insist, as against his grantor, that the withdrawal of subterranean water will deprive him of a reasonable degree of support for the due execution of that object; and may make his grantor liable accordingly.

Rigby *v.* Bennett.

In *Rigby* v. *Bennett*,[1] which was also a case as between vendor and purchaser, Jessel, M.R., said: "A man generally may drain his own land, and may make excavations on his own land; but, if he is debarred from doing one to the prejudice of the grantee, why may he do the other?"

Shelfer *v.* City of London, &c., Co.

In *Shelfer* v. *City of London, &c., Co.*,[2] where support for a house from percolating water had existed for more than twenty years, Kekewich, J., held that the right to it had been acquired.

Jordeson *v.* Sutton, &c., Co.

In *Jordeson* v. *Sutton, &c., Co.*[3] the substance giving the support was, by a majority of the Court of Appeal, held to be a bed of "running silt," little distinguishable, but still distinguishable, from water. It was not therefore necessary to decide what, if the substance had been actual water, the result would have been. The case is, however, of importance, as containing observations upon *Popplewell* v. *Hodkinson* by all the members of the Court. The plaintiff was the owner of houses which had been built for more than twenty years. The defendants were a gas company, who owned the adjoining land, and between whom and the plaintiff there was no privity of title. The defendants excavated their land for the purpose of erecting a gasometer; and, in so doing, penetrated a bed of "running silt," which extended under the plaintiff's land as well as their own. They then drained the excavation; and the result was to withdraw a large quantity of the silt from under the plaintiff's land, and to cause a subsidence of the surface

[1] 21 Ch. D. 563, 564.
[2] 1895, 1 Ch. 301.
[3] 1899, 2 Ch. 217.

and damage to the houses. The case, therefore, differed from *Elliot* v. *N. E. Railway Co.*, *Popplewell* v. *Hodkinson*, and *Rigby* v. *Bennett*, in not being a case as between vendor and purchaser. And it differed from *Popplewell* v. *Hodkinson* in not being a case of drainage for ordinary uses. It raised the broad question (assuming that the "running silt" was water) of the right of support from underground water. Lindley, L.J., said that he was not satisfied that that question could be considered as finally settled by *Popplewell* v. *Hodkinson*, or any other decision.[1] Rigby, L.J., intimated that he was disposed to consider, that all that *Popplewell* v. *Hodkinson* decided was this :—A man, who would in general be entitled to prevent his neighbour from withdrawing support, could not complain, if all that his neighbour was doing was draining his own land, so as to enable him to enjoy it beneficially in the ordinary way.[2] Vaughan Williams, L.J. (who in the actual decision was in a minority), considered that *Popplewell* v. *Hodkinson* had decided the general question ; and was also of opinion, that, *primâ facie*, there is in fact no right of support from underground water.[3]

English *v.* Metropolitan Water Board.

In *English* v. *Metropolitan Water Board*,[4] Lord Alverstone held, that, if there was no direct abstraction, but merely the withdrawal of support of subterranean water, no action could be maintained, and that *Popplewell* v. *Hodkinson* had so decided.[5] It made (he thought) no difference, that the withdrawal of the support had diminished the quantity of the water passing through the plaintiff's land. The diminution was the consequence of the withdrawal of support, and that alone.[6]

Gill *v.* Westlake.

Finally in *Gill* v. *Westlake*,[7] Lord Macnaghten, in delivering the judgment of the Privy Council, adopted the view of the Isle of Man Court, that, where there was no lateral movement, but only a downward movement resulting from abstraction of subterranean water, there was no cause of action. This was equivalent to a statement that *Popplewell* v. *Hodkinson* had decided the general question ; and, although *Jordeson* v.

[1] 1899, 2 Ch. at p. 239.

[2] See pp. 242, 243.

[3] See pp. 247 *et seq.* In Lonsdale *v.* Littledale, 2 H. Bl. 267, damages were recovered against a mine owner for withdrawing subterraneous water. But it does not appear under what circumstances : see the note of that case in Jordeson *v.* Sutton, &c., Co., 1899, 2 Ch. at pp. 233, 234.

[4] 1907, 1 K. B. 588.

[5] See p. 602.

[6] See p. 603. Cf. Trinidad Co. *v.* Ambard, 1899, A. C. 594, cited, *post*, p. 534.

[7] 1910, A. C. 197.

Sutton, &c., Co. was not cited in this case, it may perhaps be considered to conclude the matter.

Grant. If there is a grant of the right, whether express or implied, the grant is effective.[1]

Prescription. In *Shelfer* v. *City of London, &c., Co.*, Kekewich, J., held, as has been already stated,[2] that, even if the right of support from water did not exist *primâ facie*, the enjoyment of the support of buildings from percolating water for twenty years created a right to its continuance. In *Jordeson* v. *Sutton, &c., Co.*,[3] Rigby, L.J., came to a similar conclusion. The dicta in *Popplewell* v. *Hodkinson*, that the right could be conferred by grant, involved, he said, this conclusion. It is submitted, that in this respect their lordships went too far. If the right of support from percolating water does not exist *primâ facie*, how can an enjoyment of it for twenty years, as regards the surface in its natural state, be otherwise than precarious? And if so, how can it confer a right as regards buildings upon the surface? If a man is not entitled to support for land in its natural state he cannot acquire by prescription a right of support for the same land in its non-natural state.[4]

PART G.—REMEDIES.

Person entitled generally. Where a subsidence has occurred, and the owner of the injured property subsequently transfers it, he continues to be, *primâ facie*, entitled to enforce the remedy. But if the parties agree, the benefit of the remedy may probably be also transferred, as an incident to the transfer of the property.[5] And where a vendor sells land damaged by subsidence, but the price is on the footing that it has not been damaged, the purchaser may sue in the name of the vendor as a trustee for him.[6]

Person entitled —corporations. A corporation has, *primâ facie*, the same remedies in respect of subsidence as an individual.[7]

Questions as to person liable. Several questions may arise when the right of support has been infringed. (1) There may have been contemporaneous

[1] See Popplewell *v.* Hodkinson, L. R. 4 Exch. 248, and Shelfer *v.* City of London, &c., Co., 1895, 1 Ch. 301, cited *ante*, pp. 439, 440.

[2] *Ante*, p. 440.

[3] 1899, 2 Ch. at p. 244.

[4] See *ante*, pp. 321—323.

[5] See Dawson *v.* G. N., &c., Co., 1904, 1 K. B. 277; 1905, 1 K. B. 260.

[6] Stroyan *v.* Knowles, 6 H. & N. 454.

[7] A.-G. *v.* Logan, 1891, 2 Q. B. 102, 104.

workings by different mine owners. Which of them is liable? (2) There may have been successive workings by different mine owners. Which of them is liable? (3) The mine owner at the time of the working and the mine owner at the time of the subsidence may not be the same persons. Is the latter liable? (4) The subsidence may be caused by a lessee. Is the lessor liable? (5) Are contractors liable? (6) Is a trustee liable?

Contemporaneous workings by different persons.

Where there have been contemporaneous workings by different mine owners, the difficulty of determining who is the person liable frequently leaves the surface owner without a remedy. Even in the case of ordinary mining operations such a position is by no means unknown. In such operations as brine-pumping it is the rule.[1]

Salt Union, &c. *v.* Brunner, Mond, &c.

In *Salt Union, &c.* v. *Brunner, Mond, &c.*,[2] the plaintiffs and defendants were adjoining brine-pumpers; and the plaintiffs claimed an injunction to restrain the defendants from pumping in such a manner as to cause subsidence of the plaintiffs' land. It was impossible to say how far the subsidences in question were caused by the defendants' pumping; or were caused or contributed to by the plaintiffs' own pumping, or by the pumping of third parties. It was held that the plaintiffs were without a remedy.[3]

Successive workings by different persons.

A question as to the position where there are successive workings by different mine owners is suggested by *Darley Main Colliery Co.* v. *Mitchell*.[4] There the lateral owner, without whose workings there would not have been any further subsidence, had not in working acted unlawfully.[5] If, however, his workings had been unlawful, what would have been the position? It might, for example, be shown that they would have caused damage to the surface, even if the subjacent mines had been left unworked.[6] Or the subjacent mines might have been worked more than twenty years previously, and an easement might have been acquired against the lateral owner under the principle of *Dalton* v. *Angus*.[7] Lord Bramwell [8] expressed his opinion that the lawful character of the lateral

[1] See *ante*, pp. 434, 435.

[2] 1906, 2 K. B. 822.

[3] See further, as to this case, *post*, p. 496.

[4] 11 A. C. 127.

[5] See *ante*, p. 295.

[6] See, as to this, *ante*, pp. 305–307.

[7] See *ante*, pp. 322, 323. A lateral worker, who is a trespasser, is of course in a similar position. As to trespassers, see *post*, pp. 541, 549.

[8] 11 A. C. at p. 146.

workings was immaterial for the purpose of determining whether the subjacent owner was liable.

Is remedy against owner at time of subsidence? —dicta in Mitchell *v.* Darley Main Colliery Co.

In *Mitchell* v. *Darley Main Colliery Co.*,[1] two possible views were suggested as to the real cause of action when support was removed. Either the subsidence itself is the cause of action. Or the cause of action is the continuing omission to provide artificial support.[2] And in discussing these views Bowen, L.J., said:[3] "Applying the reasoning of *Whitehouse* v. *Fellowes*,[4] it seems to me that there has really been not merely an original excavation or act done, but a continual withdrawal of support, that is to say, not merely an original act the results of which remain, but a state of things continued, and a state of things continued which has led to and caused the subsequent damage."[5] In the same case, when in the House of Lords,[6] however, it was admitted, "that, after the partial subsidence in 1868, the strata remained practically quiescent until the working of the coal in the next adjoining land in 1881."[7] The facts were not, therefore, as Bowen, L.J., assumed them to be. And in the House of Lords Lord Blackburn made the following observations upon the words used by Bowen, L.J.: "If I could take that view of the facts, I should agree in the conclusion. But I cannot take that view of the facts. One consequence of doing so would be that when the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked-out seam lay would be liable to an action for continuing a nuisance. Surely the facts cannot be such as would produce that effect. And unless they are, I do not think that they can make the defendants responsible on this ground."[8] The observations of Lord Blackburn (who in the actual decision was in a minority) are not to be understood as a statement, that it is a result of the decision, that a person who has taken no part in the working of a mine, but who happens to be in possession when the subsidence happens, is liable. He was merely criticising Bowen, L.J.'s view that there had been a continual withdrawal of support, and pointing out what, in his

[1] 14 Q. B. D. 125.
[2] See *ante*, pp. 294, 295.
[3] 14 Q. B. D. 138.
[4] 10 C. B., N. S. 765, 784.
[5] 14 Q. B. D. 138.
[6] Darley Main, &c., Co. *v.* Mitchell, 11 A. C. 127.
[7] *Ib.*, p. 128.
[8] *Ib.*, p. 144.

own opinion, would be the consequence of assuming, that in all cases of successive subsidences there had been a continual withdrawal of support.

Greenwell *v.* Low Beechburn Coal Co.

Lord Blackburn's observations, however, suggest the question, Can a person who has taken no part in the working of the mines, but who happens to be in possession when the subsidence happens, be made liable? This question was answered in the negative in *Greenwell* v. *Low Beechburn Coal Co.*,[1] on the ground that there was no duty on such person to prevent the subsidence; and the decision was followed in *Hall* v. *Norfolk*.[2] And whether, in such a case, the person in possession could have taken steps to prevent the subsidence, does not seem material.[3]

Lessor or lessee.

If a mine owner demises the mine, and the lessee wrongfully withdraws support from the surface, it is against the lessee, and not against the lessor, that a remedy is generally available. In like manner, if a mine owner grants a licence to work, and the licence is irrevocable,[4] the licensee is alone responsible for any damage for the wrongful withdrawal of support.[5] But if a lessee acts under the authority of his lessor, both are liable for the wrongful withdrawal of support.[6] And if a mine owner grants a licence to work; and the licence is revocable; and the licensor knows that damage may ensue from the contemplated acts of the licensee; the licensor is liable as well as the licensee. For he might have revoked the licence, and so prevented the damage.[7]

[1] 1897, 2 Q. B. 165, *per* Bruce, J.

[2] 1900, 2 Ch. 493, *per* Kekewich, J. The same point was decided in the same way by Collins, J., at the York Assizes on March 6th, 1896, in Alderson *v.* Bolckow, Vaughan & Co. See also G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 169, in which Kekewich, J., intimated, that a purchaser could not be liable for the result of workings by his vendor. See also the Scotch case of Geddes *v.* Haldane, 14 S. L. T. 328.

[3] See Greenwell *v.* Low Beechburn Co., 1897, 2 Q. B. at p. 179.

[4] See *ante*, pp. 271, 272.

[5] See Atkinson *v.* King, 2 L. R. (Ir.) 320.

[6] Siddons *v.* Short, 2 C. P. D. 572; Davis *v.* Treharne, *per* Lord Coleridge, and the Court of Appeal: cf. White *v.* Jameson, 18 Eq. 303; Harris *v.* James, 45 L. J. Q. B. 545. In Davis *v.* Treharne, where there were successive leases of surface and mines, the mineral lessee was held liable; but judgment was given in favour of the common lessor, on the ground that he had not in fact authorised any wrongful working. The decision, on the former point, was taken to the House of Lords, and is reported in 6 A. C. 460. The decision on the latter point is not reported.

[7] Atkinson *v.* King, *sup.* p. 337.

Contractors.

Contractors are liable, as well as their principals, for damage through subsidence caused by their acts.[1]

Trustee.

Where the wrong-doer is a trustee, who was working his testator's mines for the benefit of the estate, and was doing so in a reasonable way; and damages are recovered against the trustee; the injured party is entitled to be paid direct out of the testator's estate.[2] Where an equitable tenant for life is entitled to possession, and takes possession, and causes subsidence, the trustee is not of course liable. But where a trustee puts a tenant for life in possession voluntarily, the position may be different.[3]

Where obstruction to highway.

A railway company constructed a railway on the level across a highway. Subsequently the defendants worked mines beneath the highway, with the result that a gradual and uniform subsidence, to the extent of about ten feet vertically, took place of the highway, railway, and surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway company placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway. It was held, that the remedy (if any) was against the railway company, and not against the defendants.[4]

Previously specified remedies.

Sometimes particular remedies are specified by anticipation, either by the parties themselves or by the legislature, for the damage which may be sustained by the withdrawal of support; in such a way that those remedies only are available. And, when this is so, care should be taken that the specified remedies are pursued.[5] Where a bed of running silt is abstracted under an Act incorporating the Wat. Cl. Act, and support is in consequence withdrawn, compensation for injurious affection is recoverable under section 6 or section 12 of the latter Act.[6] In other cases, although particular remedies

[1] Jordeson *v.* Sutton, &c., Co., 1898, 2 Ch. 626, 627; 1899, 2 Ch. 218.

[2] *Re* Raybould, 1900, 1 Ch. 199.

[3] Wright *v.* Leigh, *coram* Fry, L.J., Apr. 2nd, 1890.

[4] A.-G. *v.* Conduit Coll. Co., 1895, 1 Q. B. 301. Cf. Evans *v.* M. S. & L. R. Co., 36 Ch. D. 626; Wednesbury Corporation *v.* Lodge Holes Coll. Co., 1905, 2 K. B. 823.

[5] Buccleuch *v.* Wakefield, L. R. 4 H. L. 377.

[6] Fletcher *v.* Birkenhead Corporation, 1906, 1 K. B. 605; affirmed, 1907, 1 K. B. 205.

may be specified, the ordinary remedies may be also available, and the remedies may in fact be cumulative.[1]

Ordinary remedies—damages.

Subject to the necessity in proper cases of pursuing certain specified remedies, an ordinary action for damages will lie for infringing the right of support.[2] And if a reversioner and a lessee have both been injured in respect of the same property, each may recover in proportion to his injury.[3]

Measure of damages—generally.

In the case of ordinary land or a building, damages may be recovered for the cost of repairs, for loss of rent, and for actual structural depreciation.[4] And the wrong-doer will not be allowed to call the injured party to account for minute mistakes or miscalculations in making good the damage, provided the latter acts honestly and reasonably.[5] This, however, is in general the limit of the wrong-doer's liability. And he is under no greater liability to a local authority than to an ordinary landowner. When therefore a highway is let down, the local authority are not entitled, at his expense to raise the same to the old level, cost what it may; and whether it is more commodious to the public or not. They are only entitled to recover what it would have cost to make an equally commodious road.[6]

Measure of damages—profit-carning property.

When, however, a profit-earning property is injured, damages are recoverable for the loss of profits.[7] And if, as in the case

[1] Harris *v.* Ryding, 5 M. & W. 60; Smart *v.* Morton, 5 E. & B. 30; Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 *ib.* 625; Dugdale *v.* Robertson, 3 K. & J. 695; Richards *v.* Jenkins, 17 W. R. 30.

[2] As to land in its natural state, see Harris *v.* Ryding, *sup.*; Humphries *v.* Brogden, 12 Q. B. 739; Smart *v.* Morton, *sup.*; Bonomi *v.* Backhouse, E. B. & E. 622; Backhouse *v.* Bonomi, 9 H. L. C. 503; Proud *v.* Bates, 34 L. J. Ch. 406, 412; Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 574. As to an underlying stratum, see Butterley Co. *v.* New Hucknall Co., 1908, 2 Ch. 175. As to land in its non-natural state, see Hilton *v.* Granville, 5 Q. B. 701; Roberts *v.* Haines, *sup.*; Haines *v.* Roberts, *sup.*; Rogers *v.* Taylor, 2 H. & N. 828; Brown *v.* Robins, 4 *ib.* 186; Allaway *v.* Wagstaff, *ib.* 681; Hunt *v.* Peake, Joh. 705; Richards *v.* Jenkins, *sup.* Aspden *v.* Seddon, 1 Ex. D. 496; Chapman *v.* Day, 47 L. T. 705; Bell *v.* Love, 10 Q. B. D. 547; Normanton Gas Co. *v.* Pope, 48 L. T. 666, affirmed 52 L. J. Q. B. 629; G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 157.

[3] Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454.

[4] Tunnicliffe, &c. *v.* West Leigh Coll. Co., 1905, 2 Ch. 390, 1906, 2 Ch. 22; West Leigh Coll. Co. *v.* Tunnicliffe, &c., 1908, A. C. 32, 33.

[5] Lodge Holes Coll. Co. *v.* Wednesbury Corporation, 1908, A. C. at 325.

[6] Lodge Holes Colliery Co. *v.* Wednesbury Corporation, 1908, A. C. 323; reversing Wednesbury Corporation *v.* Lodge Holes Colliery Co., 1907, 1 K. B. 78; and restoring the decision of Jelf, J., in S. C., 1905, 2 K. B. 823.

[7] Stroyan *v.* Knowles, 6 H. & N. 454; Doxford *v.* Wearmouth Coal Co., before Mr. Pollock as official referee, 5th Dec. 1911.

of a shipyard, the restoration of the yard and of the structures thereon to their old level is necessary for the carrying on of the business as advantageously as before, the cost of restoration is recoverable.[1]

Measure of damages—risk of second subsidence.

It has been already seen that the right of support is not infringed until subsidence actually occurs;[2] and that each fresh subsidence creates, as it occurs, a fresh cause of action.[3] It follows, that, in assessing damages for subsidence, the depreciation in the market value attributable to the risk of further subsidence cannot be taken into account.[4] If depreciation "caused by apprehension of future mischief does not furnish a cause of action by itself,[5] . . . it is difficult to see how the missing element can be supplied by presenting the claim in respect of depreciation tacked on to a claim in respect of a wrong admittedly actionable."[6]

Injunction—when granted.

An injunction may also be obtained to restrain the infraction of the right.[7] It will be granted on proof of substantial subsidence, although unaccompanied by appreciable damage.[8] It will not be refused on the mere ground that the injury is of such a nature as to be capable of being satisfied by damages;[9] or that the damages which could be recovered would be trivial;[10] or that, if it is granted, a local industry will be stopped.[11]

When not granted.

An injunction will not, however, be granted unless either

[1] Doxford *v.* Wearmouth Coal Co., *supra.*

[2] *Ante*, p. 294.

[3] *Ib.*

[4] West Leigh Colliery Co. *v.* Tunnicliffe, &c., 1908, A. C. 27; reversing Tunnicliffe, &c. *v.* West Leigh Colliery Co., 1906, 2 Ch. 22, *per* Collins, M.R., and Hardy, L.J.; Romer, L.J., dissenting; and restoring S. C. 1905; 2 Ch. 390, *per* Eady, J.

[5] See *ante*, p. 294.

[6] West Leigh Coll. Co. *v.* Tunnicliffe, &c., *sup.*, 29, 30, *per* Lord Macnaghten.

[7] As to land in its natural state, see Proud *v.* Bates, 34 L. J. Ch. 406; Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 594. As to an underlying stratum, see Mundy *v.* Rutland, 23 Ch. D. 81; Butterley Co. *v.* New Hucknall Co., 1908, 2 Ch. 475, 486. As to land in its non-natural state, see Dugdale *v.* Robertson, 3 K. & J. 695; Hunt *v.* Peake, Joh. 705; Elliot *v.* N. E. R. Co., 10 H. L. C. 333; N. E. R. Co. *v.* Crossland, 2 J. & H. 565, 2 De G. F. & J. 550; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 288; G. W. R. Co. *v.* Smith, 2 Ch. D. 235, nom. Smith *v.* G. W. R. Co., 3 A. C. 165; Siddons *v.* Short, 2 C. P. D. 572; G. W. R. Co. *v.* Cefn, &c., Co., 1894, 2 Ch. 157.

[8] See, as to this, *ante*, p. 298.

[9] Siddons *v.* Short, *sup.* 577.

[10] Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 600.

[11] *Ib.* 602, 603: see Westmorland *v.* New Sharlston Co., 79 L. T. 722.

actual damage has already occurred ; [1] or damage is " imminent and certain ; " [2] or the defendant claims the right to work in an improper manner.[3] Nor, when there is no claim of right, will it be granted, where the defendant's operations have been completed, and it is shown that no further damage need be anticipated.[4] And where the party seeking an interlocutory injunction has, with knowledge of the probable consequences, abstained from interference until the workings have proceeded for a considerable distance, and considerable expense has been incurred, he will not, having regard to the serious injury which may be caused by stopping mining operations,[5] be allowed it.[6]

Form when granted.

When the infraction of the right is restrained, it will, consistently with the principle that degrees cannot be measured out to which the right may extend,[7] be restrained in the most general words, and without specifying any limits within which the workings may be carried on.[8]

Mandatory injunction.

In a proper case a mandatory injunction may be obtained.[9]

Inspection.

On making a *primâ facie* case, a litigant may obtain, upon interlocutory application, liberty to inspect his neighbour's mine and workings and working plans, for the purpose of ascertaining whether his right of support has been infringed.[10]

[1] See Birmingham *v.* Allen, 6 Ch. D. 287, 288, *per* Jessel, M. R.

[2] See Darley Main Coll. Co. *v.* Mitchell, 11 A. C. 145, *per* Lord Bramwell. See also Siddons *v.* Short, *sup.*, and see Birmingham *v.* Allen, *sup.* 287, *per* Jessel, M. R. In Siddons *v.* Short, *sup.*, Grove, J., intimated (p. 577) that a " reasonable probability of damage " was sufficient ; but this does not seem correct.

[3] See Hext *v.* Gill, 7 Ch. 699, 711, 712 ; A.-G. *v.* Conduit Coll. Co., 1895, 1 Q. B. 307, 314 : see L. & N. W. R. Co. *v.* Howley Park, &c., Co., 1911, 2 Ch. 97.

[4] Jordeson *v.* Sutton, &c., Co., 1898, 2 Ch. at p. 628, 1899, 2 Ch. 217. The Court will sometimes, where there is a conflict of evidence, or otherwise in cases of doubt, take an independent report from a referee, and act upon it : see Mundy *v.* Rutland, 23 Ch. D. 97, 98.

[5] Hilton *v.* Granville, 1 Cr. & Ph. 297. See also *ante*, p. 98, n. [5], and other cases there cited.

[6] See Hilton *v.* Granville, 1 Cr. & Ph. 283, 296—298.

[7] *Ante*, pp. 291, 292.

[8] As to land in its natural state, see Bell *v.* Joell, Set. 574, 575. As to an underlying stratum, see Mundy *v.* Rutland, *sup.* 94, 98. As to land in its non-natural state, see Cal. R. Co. *v.* Sprot, 2 Macq. 454 ; Hunt *v.* Peake, Joh. 713 ; Elliot *v.* N. E. R. Co., 10 H. L. C. 333, N. E. R. Co. *v.* Crossland, 2 J. & H. 580, 4 De G. F. & J. 560.

[9] See the form of the order in Bell *v.* Joell, Set. 574, 575.

[10] See Wall *v.* Dunn, Set. 574 ; Baynton *v.* Leonard, *ib.* 576. For the forms of a declaration as to a plaintiff's right of support, and an injunction staying the working of minerals necessary to such support, and that the defendant should permit

Stat. of Limitations.

If six years have elapsed since the right of support, whether for land in its natural state, or for land in its non-natural state, has been infringed, the remedy will be barred.[1] But it must be remembered that, although something may have been done which afterwards produces damage, the right is not infringed until damage actually takes place.[2]

Acquiescence.

The remedy will not easily be barred by acquiescence. For instance, the lord of a manor, who by the permission of his copyholder works under the copyhold, and in the course of his workings injures the copyhold buildings, will not escape liability by alleging that the copyholder must have known the probable results of the working.[3] So the mere fact, that the injured party has for a long period accepted a money compensation for the damage done to him by subsidence, does not prevent him from taking proceedings to restrain the repetition of acts of the same kind.[4]

Death of wrong-doer.

Unless the statutory exception[5] to the maxim, *Actio personalis moritur cum personâ*, applies, the remedy will, as against the estate of the owner whose working caused the damage, be lost by his death.[6]

the plaintiff to have access to the mines for the purpose of making supports, see Dugdale *v.* Robertson, 3 K. & J. 701. For the form of a declaration as to a plaintiff's right to compensation in respect of damage by mining under his houses or by subsidence of the soil, with an injunction and an inquiry as to damages, see Hunt *v.* Peake, Joh. 713. For the form of an injunction restraining in general words the infraction of the right of support, see Bell *v.* Joell, Set. 574, 575; Baynton *v.* Leonard, *ib.* 576; Wall *v.* Dunn, *ib.* 574 (a case of support for a church); Hunt *v.* Peake, Joh. 713; Elliot *v.* N. E. R. Co., 10 H. L. C. 333; N. E. R. Co. *v.* Crossland, 2 J. & H. 580, 4 De G. F. & J. 560; Mundy *v.* Rutland, 23 Ch. D. 81, 94, 98 (a case of support for the barrier of an underlying stratum). And for the form of an order giving liberty to inspect, see Wall *v.* Dunn, *sup.*; Baynton *v.* Leonard, *sup.*

[1] Bonomi *v.* Backhouse, E. B. & E. 622; Backhouse *v.* Bonomi, 9 H. L. C. 503.

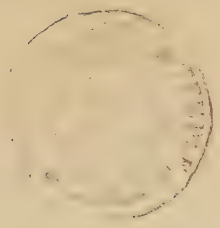
[2] *Ib.*; *ante*, p. 294. Cf. the position of a trespasser who causes a subsidence, *post*, p. 549.

[3] See Bankart *v.* Houghton, 27 Beav. 433.

[4] In Butterley Co. *v.* New Hucknall Co., 1908, 2 Ch. 475.

[5] See, as to this, *post*, p. 488.

[6] See Phillips *v.* Homfray, 24 Ch. D. 439, 449 (the fourth inquiry). As to the other inquiries in the latter case, see *post*, pp. 488, 550. See also Chapman *v.* Day, 49 L. T. 436, reversing S. C. 31 W. R. 767; Wright *v.* Leigh, *coram* Fry, L. J., April 2nd, 1890; Hall *v.* Norfolk, 1900, 2 Ch. at p. 494.



CHAPTER XV.

NEIGHBOURS—SINKING PITS—QUARRYING—OTHER INCIDENTAL RIGHTS.

a.—SINKING PITS, ERECTING MACHINERY, DEPOSITING SPOIL, REMOVING OTHER MINERALS, &c.

(*a*) *Common Law Rights.*[1]

Generally—sinking pits.

WHERE mines are severed from the overlying surface, whether by a grant of the land excepting the surface, or by a grant of the land excepting the mines, the mine owner has, it would seem, as incident to the enjoyment, and without any express provision, a right, *primâ facie*, to go upon the surface lands, and dig pits, and get the minerals.[2] And he has, of course, the same right, if it is not known in what manner the severance of his property from the overlying property was effected. *A fortiori*, if a mine owner merely requires a method of communication with his mines for the purpose of working them, he is, for this purpose, entitled, *primâ facie*, to sink a shaft through the overlying land from the surface to the mines.[3]

Fixing machinery—constructing ponds, railways, or sough-pits.

Where, upon a severance of surface land from the underlying mines, a liberty to dig pits is expressly granted or reserved, the mine owner has, as incident to the liberty, the right, *primâ facie*, to fix such machinery upon the surface as may be necessary, as well to drain the mines, as to draw the minerals from

[1] The general principles, which apply to questions of support, apply equally to the questions discussed in this chapter. See, as to support, *ante*, pp. 287, 288.

[2] See Cardigan *v.* Armitage, 2 B. & C. 207; Durham, &c. Co. *v.* Walker, 2 Q. B. 965; Marshall *v.* Borrowdale, &c., Co., 8 T. L. R. 275. But see Harris *v.* Ryding, 5 M. & W. 66, *per* Lord Abinger.

[3] See Goold *v.* Great Western Deep Coal Co., 2 De G. J. & S. 600; *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 466, 471. The principle involved is properly that of a way of necessity, and is more fully discussed *post*, pp. 483, 484. Cf. Blakesley *v.* Whieldon, 1 Ha. 176, 180.

the pits.[1] And if steam engines are necessary for these purposes, their erection cannot be objected to by the surface owner.[2] And if, in such a case, the mine owner has a right to use engines for draining the mines or drawing the minerals from the pits, the construction by him of an engine-house or of a pond upon the surface may not be unlawful.[3] So, where a liberty is reserved to a grantor, with his servants, horses, and carriages, to enter and carry away the minerals, he may lay down a railway for working them, if such railway is reasonably necessary for that purpose.[4] So, where a liberty is granted or reserved of making a sough or drain, the right to make sough-pits at any time afterwards for repairing the drain, so long as the original purpose requires it, is impliedly granted or reserved.[5]

Laying minerals or rubbish on surface.

Where, upon a severance of surface land from the underlying mines, rights of working are expressly granted or reserved, the mine owner will probably, as incident to the granted or reserved rights, possess the right of laying upon the surface the minerals, or the rubbish obtained in working them.[6] The grant of liberty to take stone from a quarry may entitle the grantee to cast the spoil upon the grantor's land which immediately adjoins; as an incident.[7]

Property in spoil.

In view of the growing value of bye-products it is a question of importance whether spoil deposited on the surface belongs to the surface owner or the mine owner. There are two cases which bear upon it; *Robinson* v. *Milne*,[8] and *Boileau* v. *Heath*.[9] The former is obscurely reported, and not easy to follow. The following were the material facts. There were two coal leases which may be called the "Jones" lease, and the "Lees" lease. Jones was the lessor under the "Jones" lease, and he was also the owner of the superjacent surface. He had also become the purchaser of a part of the surface superjacent to the coal comprised in the "Lees" lease. The coal lessee (who was the plaintiff) was

[1] See Dand *v.* Kingscote, 6 M. & W. 174.

[2] *Ib.*

[3] *Ib.* Cf. Wake *v.* Hall, 8 A. C. 202, 205, 208, 209, 212, 214, 215 (a case under the Derbyshire customs, see p. 571 of the 3rd edition of this book), where the exercise of somewhat similar rights was held lawful.

[4] Antrim *v.* Dobbs, 30 L. R. (Ir.) 424.

[5] Hodgson *v.* Field, 7 East, 613.

[6] See Cardigan *v.* Armitage, 2 B. & C. 211; Marshall *v.* Borrowdale, &c., Co., 8 T. L. R. 275.

[7] Middleton *v.* Clarence, Ir. R. 11 C. L. 499.

[8] 53 L. J. Ch. 1070.

[9] 1898, 2 Ch. 301.

entitled to deposit, and did deposit spoil on the surface. In that state of facts Jones granted a building lease, with an exception of all minerals. The building lessee (who was the defendant) had abstracted (1) brick earth, and (2) part of the spoil; and he claimed to be entitled to do both. As regards the spoil (which was the only matter which affected the coal lessee) the building lessee said, that, wherever the title was, it was not in the coal lessee. The decision as to the spoil was that the coal lessee was entitled to dispose of it. Another action was at the same time heard in which the surface owner (Jones' successor in title) claimed the brick earth as against the building lessee; but he did not claim the spoil. The decision in *Robinson* v. *Milne* therefore involved the conclusion, that the spoil did not belong to the surface owner, apart from the fact that he did not claim it in his own action. The coal lessee was, however, under a covenant to remove the spoil at the end of the leases; a fact on which the Judge in part relied. In *Boileau* v. *Heath* the plaintiffs were the owners of land containing coal and iron, of which they had granted a lease. The lessee produced refuse; and threw it upon the surface; and allowed it to form a heap there. It was held that the refuse had ceased to be a chattel; and had become part of the land for the benefit of the plaintiffs. *Robinson* v. *Milne* was not cited in, and is not consistent with, *Boileau* v. *Heath*. It is submitted, that, unless it can be justified because of the covenant to remove, it was wrongly decided; and that the true view, in accordance with *Boileau* v. *Heath*, is that the property in spoil left on the surface is, *primâ facie*, in the surface owner.

Carrying minerals away.

Where upon a severance of surface land from the underlying mines, rights of working are expressly granted, or reserved, the mine owner will probably also have an incidental right to carry away the minerals across the surface.[1]

Mine owner removing obstructions.

A quarry lessee, who has covenanted not to commit waste by cutting trees, does not infringe his covenant by cutting trees excepted from the lease, and which it is necessary to remove in order to work the quarry.[2] And a power to dig for and

[1] Lord Hatherley's observations in Jegon *v.* Vivian, 6 Ch. at p. 755, as to the necessity of "taking a power" to use the surface, were presumably intended to be confined to foreign minerals.

[2] Doe *v.* Price, 8 C. B. 894.

work minerals carries with it the right to remove such parts of the strata as have to be removed either in making the shafts to win the minerals, or in getting the minerals when won.[1]

Appropriating thing removed.

It has been held, that a lessee who produces a refuse, while working his mine, is generally entitled to sell it.[2] It has been also held, that a power to dig for and work minerals (besides carrying the right to remove such parts of the strata as have to be removed) also carries the right to appropriate the parts removed.[3] In that case, however, as already stated,[4] the parts removed were spoil, and the power was granted by a lease containing a covenant by the lessee to remove the spoil at the end of the term. And, in general, it appears that a right to appropriate such parts of the strata as have to be removed is not involved in a mere power to work. It has, for example, been held that a tin bounder,[5] merely as such, working a tin mine, and extracting copper from it with the tin, has no right to the copper.[6] So it has been held, that, if the owner of an underlying seam, in the exercise of a right to sink, in order to reach and work it; removes a part of the overlying seam; the owner of the latter is entitled to an account of the part removed.[7] And where there was a grant of "mines of lead;" and an ore of zinc was so intermixed with the lead, that it was impossible to work the lead without removing the zinc; it was held, that the grantee was not entitled to appropriate the zinc.[8]

Crown grant.

The latter case was one of a Crown grant; and, although that fact was not the ground of the decision, it probably might have been. Indeed, it does not seem possible, as against the Crown, to imply even those privileges without which a grant of mines would be useless.[9]

[1] Robinson *v.* Milne, 53 L. J. Ch. 1070, 1074, *per* North, J.; A.-G. *v.* Westminster (Q. B. D. May 2nd, 1898), *per* Wright and Channell, JJ.

[2] See Boileau *v.* Heath, 1898, 2 Ch. at p. 305.

[3] Robinson *v.* Milne, 53 L. J. Ch. 1070, 1074, *per* North, J.

[4] *Ante*, p. 453.

[5] Pp. 482 *et seq.* of the 3rd edition of this book.

[6] Rogers *v.* Brenton, 10 Q. B. 56, *per* Lord Denman.

[7] Goold *v.* Great Western Coal Co., 2 De G. J. & S. at p. 608, *per* Lord Westbury.

[8] A.-G. *v.* Westminster (Q. B. D. May 2nd, 1898), *per* Wright and Channell, JJ. Cf. the position where gold or silver is contained in base metal in the land of a subject, *ante*, p. 73 *et seq.* Cf. also Stokes *v.* Arkwright, 66 L. J. Q. B. 845. Cf. also the position in the case of waste, *ante*, pp. 92, 93.

[9] See *ante*, p. 228.

Surface owner digging foundations for house.

The surface owner, as well as the mine owner, may have a right of removal for the purpose of enjoying his property. Where land is granted or demised, with an exception of the minerals, and the purpose of the grant or demise is the erection of a house, the grantee or lessee is entitled, *primâ facie*, notwithstanding the exception, to dig out the foundations of the house.[1] And he is also, it has been said, entitled, *primâ facie*, to appropriate the minerals which he so digs.[2] But he is not entitled, *primâ facie*, to excavate the subsoil with a view to improve the land for selling, or letting; or where his main object is to carry on a trade in the manufacture of the materials.[3] The question in every such case is the extent of the implied licence; which in its turn rests upon the presumed intention of the parties.[4]

Mines royal.

There is a conflict of opinion upon the question, whether the Crown, as the owner of mines royal,[5] is entitled to go upon the overlying surface in the hands of a subject, and dig pits and get the minerals. In the Case of mines [6] it was laid down that mines of gold and silver belong to the Crown, with liberty to dig and carry away the ores thereof, and with such other incidents as are necessary to be used for the getting of the ore.[7] The contrary was laid down in *Lyddal* v. *Weston:* [8] "I am of opinion there is no such power in the Crown, and likewise that by the royal prerogative of mines they have even no such power: for it would be very prejudicial, if the Crown could enter into a subject's lands or grant a licence to work the mines." [9] It is not easy to see why, in this respect, the Crown should be in a worse position than an ordinary subject.[10] It would appear, at all events, that where the mines in question are once opened, the Crown can either work them, or grant licences for others to do so.[11]

[1] Robinson *v.* Milne, 53 L. J. Ch. 1070, 1074, *per* North, J.: see Elwes *v.* Brigg Gas Co., 33 Ch. D. 568, 569, *per* Chitty, J.

[2] Robinson *v.* Milne, *sup.*

[3] *Ib.*

[4] Elwes *v.* Brigg Gas Co., *sup.*

[5] See *ante*, p. 73.

[6] Plowd. 336.

[7] See also Saltpetre Case, 12 Rep. 13.

[8] 2 Atk. 19.

[9] *Per* Lord Hardwicke.

[10] See, as to the rights in ordinary cases, *ante*, p. 451; see also Seaman *v.* Vawdrey, 16 Ves. 393.

[11] See Lyddal *v.* Weston, 2 Atk. 19, *per* Lord Hardwicke. As to open mines, see *ante*, pp. 55 *et seq.* It is said, that the Crown may dig in the land of a subject for treasure trove: see Saltpetre Case, 12 Rep. 13. The Crown is also said to have the right to dig for and take saltpetre in the

Unnecessary user.

Any right of using a surface, to which a mine owner may be entitled by implication,[1] is confined to such things as are strictly necessary for the convenient working of the mines. The principle, according to which such a right is allowed, would not, therefore, justify any use of the surface, or any deposit upon it, to a greater extent, or for a longer period, than is absolutely necessary; or any attendance upon the land of unnecessary persons;[2] or any use of the surface for manufacturing purposes.[3] And it is doubtful, whether the principle in question would authorise a deposit upon the surface for the purpose of sale; or whether it would justify the introduction of purchasers to view the minerals.[4] And it need hardly be said, that a lessee of coal-mines has not, as such, any right to fell trees upon his lessor's land for the purposes of the land; this not being a privilege directly necessary to the enjoyment of the mines.[5] A brick lessee, who has covenanted not to take or use more of the surface than should be necessary, infringes his covenant by bringing foreign clay on to the demised land, and there making it into bricks.[6]

User not *bonâ fide*.

Any right of using a surface, to which a mine owner may be entitled by express grant, is only exercisable *bonâ fide*, and in the usual and reasonable course of working.[7]

Sinkings or erections on highways.

Persons are bound under penalties not to sink pits, or erect steam-engines, gins, or other like machinery, within twenty-five yards from any part of a carriage-way or cart-way; unless screened therefrom, so as not to be dangerous to passengers, horses, or cattle.[8]

Construction —sites of pits, &c.

Questions of construction may arise as to the places where pits may be sunk, or machinery erected.[9]

Compensation for

In *Mordue* v. *Durham*[10] a conveyance, with an exception of

lands of subjects: but the owner of the land cannot be restrained from himself also digging and taking it: see *ib.* See also the other propositions laid down in 12 Rep. 12, as to the King's prerogative in saltpetre.

[1] *Ante*, pp. 451, 452.

[2] See Cardigan *v.* Armitage, 2 B. & C. 211; cf. Hodgson *v.* Field, 7 East, 621.

[3] Marshall *v.* Borrowdale, &c., Co., 8 T. L. R. 275.

[4] See Cardigan *v.* Armitage, *sup.*

[5] See D'Arcy *v.* Askwith, Hobart, 234.

[6] Newton *v.* Nock, 43 L. T., N. S. 197.

[7] See Honeywell, &c., Co. *v.* Marland, W. N. 1875, p. 46.

[8] 5 & 6 Will. 4, c. 50, s. 70.

[9] Bowler *v.* Wolley, 15 East, 444.

[10] L. R. 8 C. P. 336.

mines, gave power to the mine owners to use the surface for the purpose of working, and provided that they should compensate the surface owner for damage or spoil of ground occasioned by the exercise of the power. Previously to the conveyance workings existed, which had taken place under similar reservations. The powers were exercised, and the surface owner claimed compensation. It was held (1) that the value of the land was estimable with reference to any purpose to which it might reasonably be considered as applicable; (2) that compensation was due in respect of damage arising from the use, subsequently to the conveyance, of land included therein, which had been previously used for mining purposes; and (3) that no compensation was due in respect of the mere existence of workings in being at the time of the conveyance, or their subsequent user, without any fresh damage. In *Wright* v. *Leigh*, the other facts of which have been already stated,[1] Fry, L. J., intimated, that a covenant in the conveyance of 1699 by the other three co-owners to pay to Barnes and his successors a certain rent for every acre of the ninety acres which should be injured by making roads, or stacking coal, was void as a perpetuity.[2]

damage by user.

In *Cardigan* v. *Armitage* [3] a liberty was reserved, as incident to an exception of mines from an assurance of part of a manor, to "at all times sink and dig pits, or otherwise to sough and get coals," "and to sell and carry away with carts and carriages, and otherwise to dispose of the same." It was held, that such a liberty might be exercised by a purchaser of the remainder of the manor, although the terms of the reservation were "for the grantor, his heirs and assigns, during the time that he and his heirs should continue owners" of such remainder.

Transfer of liberties.

Where liberties, which are expressly given, are held invalid, liberties implied by law may be made available.[4] So, implied liberties will not, unless an intention to that effect is apparent in the instrument of severance, be superseded or curtailed by liberties, which are expressly given. For instance, a liberty specially granted to make two pits for the purpose of repairing

Effect on implied liberties of those expressly given.

[1] *Ante*, p. 224.

[2] It would seem, however, that such a covenant would run with the land: see *ante*, p. 254.

[3] 2 B. & C. 197.

[4] Whidborne *v.* Eccl. Comms., 7 Ch. D. 381.

a drain will not supersede the right which the law would imply to make other pits for the same purpose.[1] So, such a liberty as that reserved in *Cardigan* v. *Armitage* will not curtail any liberties, to which a grantor is entitled by implication.[2]

Measure of damages for unlawful user.

Where a man tips soil from his colliery upon a piece of land, without having any right so to do, the measure of damages is not the actual damage sustained by the injured party. It is the value of the land actually used for the purposes for which it has been so used. And for this purpose it is immaterial, that the trespass may have been committed openly and with the knowledge of the injured party.[3] The case differs, on the one hand, from cases of ordinary trespass to land, where the benefit to the wrong-doer is not considered; and, on the other hand, from wayleave cases, where the trespass is usually committed secretly.[4] But the principle is the same as that applied in wayleave cases.[5] The remedy of the injured party is, however, confined to the value of the land. He is not entitled to an account of the profits (if any) made by the wrong-doer.[6] And the principle applied in his favour is confined to the land actually used. It does not extend to adjoining land, although the value of such adjoining land may have been diminished by the tipping. As to the latter land, the measure of damages is merely the diminished value to the injured party.[7] Nor will interest be included in the computation of damage.[8]

Effect on building covenant of reserved spoil-bank powers.

Where a lease was granted, subject to an exception of mines, and to a power to the mine owner to destroy the surface by making spoil-banks and otherwise; and the lease contained a covenant by the lessee to build; the covenant was held not to be extinguished by the existence of the power.[9]

Duty to fence.

A mine owner, who, under an express or implied liberty, sinks a shaft through the surface for the purpose of working

[1] Hodgson *v.* Field, 7 East, 613.

[2] See Cardigan *v.* Armitage, 2 B. & C. 197; cf. Goold *v.* G. W. Deep Coal Co., 2 De G. J. & S. 600.

[3] Whitwham *v.* Westminster Brymbo, &c., Co., 1896, 1 Ch. 894, 1896, 2 Ch. 538.

[4] See *ib.* 2 Ch. 542, 543.

[5] See *post*, p. 486, 487.

[6] Whitwham *v.* Westminster Brymbo, &c., Co., 1896, 2 Ch. 543.

[7] *Ib.*, 1896, 1 Ch. 894, 1896, 2 Ch. 538.

[8] *Ib.*, 1896, 1 Ch. 899.

[9] Molyneux *v.* Richard, 1906, 1 Ch. 34.

his mines, is bound, *primâ facie*, to keep such shaft properly fenced. And if, through his neglect of this duty, or his insufficient performance of it, cattle belonging to the surface owner fall through the shaft, and are killed or injured, the mine owner will be liable.[1]

Compensation for damage by fences.

A mine owner, who has a customary right to excavate the surface and construct reservoirs thereon upon the terms of compensating the surface owner for all damage done, and who excavates the surface and constructs a reservoir accordingly, is bound to compensate the surface owner once for all for the permanent damage in respect of fences. But he is, on the other hand, free from all liability in respect of future damage from the same cause. For his acts are not those of a wrongdoer.[2]

(β) *Statutory Rights.*

General Inclosure Acts.

Where, under the General Inclosure Acts, the right to mines is reserved, with a further reservation of a right to work,[3] the person entitled to work may, with his tenants, agents, and servants, and with or without horses or other animals or carriages and materials of all kinds, enter; and break the surface; and search for, work, and carry away the minerals; and make pits, shafts, roads, airways, waterways, engines, and erections; and do all other things, which are necessary or convenient, as well for working as for refining and hewing, and removing water, slag, and rubbish, and accommodating the persons employed; and occupy the land for laying, ordering, and dressing the ores and minerals; and alter the course of streams; and repair and use railroads or other roads.[4] In case it shall be provided, that the compensation to be made for damage through the exercise of the right to work [5] shall be made by the owners of allotments, the person sustaining the damage may complain to two or more justices of the peace; and such justices may inquire into the complaint in a summary manner,

[1] Williams *v.* Groucott, 4 B. & S. 149. See also Sybray *v.* White, 1 M. & W. 435, where the point seems to have been assumed.

[2] Great Laxey Mining Co. *v.* Clague, 4 A. C. 115. See further, as to the fencing of excavations, *post*, p. 467, and as to fencing under the Regulation Acts see *post*, Chapter xxi.

[3] *Ante*, p. 176.

[4] 22 & 23 Vict. c. 43, s. 3.

[5] *Ante*, p. 176.

and determine the amount of compensation, and order payment thereof.[1] The compensation is payable by the owners of the allotments on whom it shall by the award have been imposed, including the owner of the allotment damaged, by a rate to be assessed upon them in respect of their allotments ;[2] and is leviable by distress.[3]

Local Inclosure Act—sinking pits, &c., on one allotment for working under any part of common.

Under a local Inclosure Act, part of a common was allotted to the lord of the manor, and the residue to the commoners, and the Act provided that nothing therein contained should prejudice the right of the lord to the royalties, but that he, &c., should at all times thereafter hold and enjoy the mines and other royalties "in as full, ample, and beneficial manner to all intents and purposes as he or they could or might have held and enjoyed the same in case this Act had not been made," provided always that in case the owner, &c., should work any mines lying under any of the allotments, the person working the same should make reasonable satisfaction for the damage and spoil of the ground to the person for the time being in possession of such ground.[4] The mine owner proposed to use existing pits and works on one of the allotments, and to sink additional pits on the same allotment ; and to do so not merely for the purpose of working minerals lying under that allotment, but for the purpose of working minerals lying under other parts of the common. It was held, that the mine owner was entitled to exercise all reasonable working powers ; and was therefore entitled to do what he proposed to do.[5] It was, however, intimated, that he would not have been entitled to pull down a house in order to sink a pit, or to use buildings or machinery belonging to another person.[6]

Duke of Cornwall and assessional manors—generally.

The Duke of Cornwall and his lessees are entitled to enter upon all lands within the seventeen assessional manors of Cornwall,[7] the mines under which belong to the Duke ;[8] and to search for, work, and carry away the mines ; and to erect buildings and machinery ; and to make pits, shafts, levels, adits, air-holes, and tramroads, and other roads and works ;

[1] 22 & 23 Vict. c. 43, s. 4.
[2] S. 5. See also s. 7.
[3] S. 6.
[4] Cf. Love *v.* Bell, 9 A. C. 286, a decision under an Act in somewhat similar terms ; see *ante*, pp. 335, 336.
[5] Hayles *v.* Pease and Partners, 1899, 1 Ch. 567.
[6] *Ib.* 581, *per* Stirling, J.
[7] See *ante*, p. 70.
[8] *Ante*, pp. 70, 71.

and to take sufficient stone, lime, and slate for such buildings and works; and to take and use and divert such water; and to use such room for ore and rubbish; and to do all other such acts; as may be necessary or convenient.[1] And the buildings, machinery, and works may either be removed, or be allowed to remain after they have ceased to be required, and are not by non-user or otherwise deemed to be abandoned.[2] But no damage is allowed to be done to any park or pleasure ground; or to any dwelling-house; or to any yard, curtilage, or garden not extending more than fifty feet from a dwelling-house.[3]

Compensation.

And, if claimed within six months, compensation must be made for damage to the surface of lands other than waste or demesne lands, or for damage to water, and for the materials taken.[4] The right to and the amount of such compensation are, if necessary, determinable by two justices, or (at the option of the person from whom it is claimed) by the Stannary Court;[5] and the compensation may be made by a periodical sum, and may be made to include both past and continuing damage.[6] No compensation is, in general, payable for twelve months after entry;[7] and the Duke is not liable for the acts of his lessees or others.[8] The compensation is payable to the person in possession or receipt of the rents and profits. But if his interest is limited or qualified, and the compensation exceeds 20*l.*, he holds it for the benefit of himself and the other persons interested in proportion to their interests; and the respective interests may be established in the Stannary Court, or in any other Court of equity.[9] And if he is under disability or unknown, or his title is disputed, the compensation is payable to the Registrar of the Stannary Court; and is applicable for the benefit of the persons interested according to the order of the Court.[10]

Notice and security.

One month's notice must be given before entry on any lands other than waste lands.[11] And security for damage may from

[1] 7 & 8 Vict. c. 105, s. 55. See also *ib.* c. 65, s. 3.

[2] *Ib.* c. 105, s. 69.

[3] S. 70.

[4] Ss. 55, 68. As to surface damage, see *ante*, p. 334.

[5] S. 56. As to the jurisdiction of the Stannary Courts, see pp. 474 *et seq.* of the 3rd edition of this book.

[6] S. 66.

[7] S. 56.

[8] S. 67.

[9] Ss. 57, 58.

[10] S. 59. See also ss. 63, 64.

[11] S. 60.

time to time be required from any person other than the Duke; and until the required security is given, the Stannary Court may restrain the prosecution of the right or entry.[1] After the determination of the entry and the payment of compensation, the security is given up; and differences as to determination and payment are determinable in the Court.[2]

Costs.

The costs of all proceedings in the Stannary Court for any of the above purposes are in the discretion of the Court, and may be taxed by the Registrar.[3]

Recovery of compensation and costs.

Compensation and costs may, if necessary, be recovered by action in the High Court, or in the Stannary Court; and any person entitled thereto has also all the privileges of a mining creditor in respect of the mines in question.[4]

Cornwall Subm. Mines Act.

Under the Cornwall Subm. Mines Act, 1858, the Crown, and persons entitled in right of the Crown to mines under the sea adjacent to Cornwall,[5] are entitled to take or use, and to pass through, over, and under, any lands forming part of the possessions of the Duchy (whether in the occupation of tenants or of the Duke), in order to make or sink pits, shafts, adits, drifts, levels, drains, watercourses, pools, or embankments; and to make, lay, place, use, and repair spoil-banks, roads, ways, bridges, and banks; and to make, erect, and repair buildings and engines; which may be necessary or convenient for working, carrying away, dressing, or making merchantable the minerals. But two months' previous notice of the nature of the facilities required must be given. And compensation (for ascertaining which special provisions exist, and in respect of which the Crown lessees, and not the Crown, are liable) must be made. And nothing must be done to weaken, injure, or endanger any house or other building. And no way, or works, or machinery, must be laid, made, or erected, or minerals dressed or made merchantable, within fifty yards of a dwelling-house, or on any garden or orchard, or so as to interfere with any of the Duke's mining operations.[6] And sufficient gates, rails, and bars, must be kept to shut up or inclose breaches and openings in fences: and

[1] S. 61. See also ss. 63, 64.
[2] S. 62.
[3] S. 64.
[4] S. 65. As to the jurisdiction of the Stannary Courts, see p. 474 of the 3rd edition of this book; and as to the privileges of a mining creditor, see pp. 513 *et seq.* of same.
[5] See *ante*, p. 71.
[6] See 21 & 22 Vict. c. 109, ss. 3—6.

sufficient conveniences made for the convenience and safety of the owners, or of adjoining owners, and of the public; in order to prevent damage or inconvenience and trespasses by cattle or other animals.[1]

Crown Lands Act.

And by the Crown Lands Act, 1866,[2] all persons entitled to or to the management of mines or quarries in or under the foreshore or the adjacent lands, and their tenants, may, on giving to the Board of Trade two months' previous notice, and doing as little damage as may be, and making compensation for all damage according to the Lands Cl. Cons. Act, 1845, the Lands Cl. Cons. (Scotland) Act, 1845, or the Rail. Act (Ireland), 1851, take into possession, or use, or pass through, over, or under, any portion of the foreshore under the management of the Board, in order to make or sink pits, levels, watercourses, &c.; or to make, lay, place, use, and repair spoil-banks, roads, &c., and engines and buildings, &c.; and do all other necessary or convenient acts for mining or quarrying purposes.[3] But these powers must not be exercised so as to injure, weaken, or endanger piers or other structures.[4] And in exercising them all necessary and proper works for the safety and accommodation of the public must be made and maintained.[5]

Lands in Ireland.

Owners of mines in Ireland have statutory powers to work them, subject to payment of compensation for damage caused; which, in default of agreement, is determinable by a jury.[6] And it has been held, that the provisions of the Act 10 Geo. 1, c. 5, extend to quarries of limestone.[7] Where mines in Ireland are demised under the Irish Leasing Acts,[8] the lessee is entitled; and where mines in Ireland are excepted from a grant of the lands, the grantor is (unless he and the grantee have the relation of landlord and tenant [9]) entitled; to erect on the lands smelting-houses and other buildings necessary for working the mines; and to cut turf thereon to be employed in the smelting; and to divert and use such streams of water passing through the lands as shall not have been previously used or occupied

[1] S. 4.
[2] 29 & 30 Vict. c. 62.
[3] S. 22.
[4] S. 23.
[5] S. 24.
[6] See 10 Geo. 1, c. 5 (see s. 4); 15 Geo. 2, c. 10; 23 Geo. 2, c. 9; 25 Geo. 2, c. 12.
[7] Fishbourne *v.* Hamilton, 25 L. R. Ir. 483.
[8] 46 Geo. 3, c. 71; 11 & 12 Vict. c. 13; and the Acts there mentioned.
[9] See 23 & 24 Vict. c. 154, s. 104.

by any mill or mill dam; making compensation for all damage to the person in possession.[1] And (notwithstanding the relation of landlord and tenant) where mines in Ireland are excepted from a grant of the lands, the person entitled to the rent in fee simple, fee farm, fee tail, or for life, with immediate remainder to his own issue, may work the mines and carry away the minerals; and he or his lessee may enter on the lands and erect houses, railways, tramways, and conveniences, and employ streams; making such compensation to the grantee as may be agreed upon, or in case of non-agreement, as may be ascertained by the chairman of quarter sessions of the county. But in exercising the latter liberties no mines or minerals can be searched for or worked on the site of any place of worship, graveyard, cemetery, or public school, or within thirty yards thereof; or on the site of any house, outhouse, garden, orchard, or avenue, without the previous consent of the tenant in possession.[2] Where the tenant from year to year of an Irish holding is evicted by his landlord for unreasonably refusing to allow the latter (he making satisfaction for any injury) to enter upon the holding for mining or quarrying purposes, the eviction is not a disturbance within the Irish Act, 33 & 34 Vict. c. 46, unless the landlord persists in the eviction after the tenant withdraws the refusal.[3] Under the Irish Act, 44 & 45 Vict. c. 49, the landlord and his licensees (making satisfaction for any injury) may enter on land subject to a tenancy agreement or lease, containing no exception or reservation, for the purposes of mining or taking minerals, or digging or searching for minerals; or quarrying, or taking stone, marble, gravel, sand, brick clay, fire clay, or slate.[4] The "making satisfaction for injury" is not a condition precedent to the right of entry.[5]

b.—QUARRYING.

(*a*) *Generally.*

Generally.

Where mines are severed from the overlying surface by a grant of the land, excepting the mines, if the process of digging and getting the minerals would, as in the case of quarrying,

[1] 46 Geo. 3, c. 71, ss. 2, 3.
[2] 23 & 24 Vict. c. 154, ss. 32, 33.
[3] S. 14: see 39 & 40 Vict. c. 63, s. 3.
[4] S. 5.
[5] Dolan *v.* Davis, 32 L. R. (Ir.) 384.

necessarily be destructive of, or seriously, continuously, and permanently injurious to the surface, the mine owner cannot *primâ facie*, work or win the minerals.[1] And where the severance is effected by a grant of the land, excepting the surface, the same principle would, it would seem, *primâ facie*, apply.[2] And if this be so, it is quite clear that like principles would apply, where it is not known in what manner the severance of the two properties has been effected. The *primâ facie* presumption will not, moreover, be rebutted, unless by language of a perfectly clear and unambiguous kind in the instrument of severance.[3] And the fact that there may be a consequent difficulty in laying down precisely what a mine owner may do and may not do is immaterial.[4] In such cases an injunction will be granted, if the defendant claims the right, although he denies having any present intention, to do the act complained of.[5]

Bell v. Wilson.

In *Bell* v. *Wilson*,[6] a conveyance of land contained an exception of all mines, with full liberty "to search for, dig, bore, sink, win, work, lead, and carry away the same; and to dig, bore, sink, win, work, and make pit and pits, trench and trenches, groove and grooves, of any kind, in, over, under, through, or along all or any part of the said closes or parcels of ground," and with other incidental liberties of the fullest kind; paying a reasonable satisfaction for all damages or spoil of ground. The right of working freestone in an open quarry was claimed. It was held, that the grantor had no such right, but had only liberty to get the freestone by underground mining.

Hext v. Gill.

So in *Hext* v. *Gill*.[7] There the conveyance of the freehold in a copyhold tenement to the copyholder contained an exception of all mines, "together with full and free liberty of ingress, egress, and regress, into and out of the said several premises, and every part thereof, with or without horses, carts, and carriages, to dig and search for, and to take, use,

[1] See Bell *v.* Wilson, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 699, 714; Whidborne *v.* Eccl. Comms., 7 Ch. D. 379, 381; Mid. R. Co. *v.* Miles, 33 Ch. D. 647.

[2] See and consider the cases as to support, *ante*, pp. 299, 300, which involve analogous principles.

[3] Hext *v.* Gill, *sup.* 714, 717, 718.

[4] *Ib.* 718.

[5] See *ib.* 699, 711, 712; cf. Hall *v.* Byron, 4 Ch. D. 679, 680.

[6] 1 Ch. 303.

[7] 7 Ch. 699.

and work the said excepted mines and minerals." There was no compensation clause. Under the tenement was a bed of china clay, which, it was admitted, could not be gotten without totally destroying the surface. It was held that the mineral owner had no right to get the clay.[1]

A.-G. *v.* Welsh Granite Co.

In *A.-G.* v. *Welsh Granite Co.*[2] an Inclosure Act provided for an allotment being made to the King as lord of the manor. It then gave power to the Commissioners of Woods to sell this allotment, subject to the right of the King to "the mines, ores, minerals, coal, limestone, or matter whatsoever" in or under the same. It then reserved to the King his rights to any "mines, ores, minerals, coal, limestone, or slate" in the common land; and provided that he might search for, dig, raise and carry away the same as freely and effectually as if the Act had not been passed, save only that he should do as little damage as possible in the lands to be inclosed, and should make reasonable satisfaction to the allottees. Under these provisions the right of working granite by open workings was claimed. It was held,[3] that the case differed from *Bell* v. *Wilson*,[4] and that the claim was well founded.

Liability for damage under contract.

Where an instrument, which empowers the owner of a quarry to work it by quarrying, provides that the owner of the rest of the land shall be compensated for all damage which he may thereby sustain, the proviso binds the quarry owner for the time being in favour of the owner for the time being of the rest of the land.[5] The proviso does not, however, operate as a covenant; and does not therefore create anything more than a simple contract debt.[6]

Mode of dealing with damages where surface in settlement.

Where a surface belongs to one for life, with remainders over, and damages are recovered for injury to the surface, they are dealt with on similar principles [7] to those which apply where mines belong to one for life who is not entitled to work them, with remainders over, and they are wrongfully worked by a stranger.[8]

[1] For the form of the order restraining him, see 7 Ch. 718: see also Whidborne *v.* Eccl. Comms., 7 Ch. D. 381.

[2] 35 W. R. 617.

[3] *Per* Lord Esher and Lopes, L. J., Fry, L. J., doubting.

[4] *Ante*, p. 465.

[5] *Re* Donegal, W. N. 1888, p. 112; cf., as to support, *ante*, pp. 310, 311.

[6] *Re* Donegal, *sup.*

[7] See Bell *v.* Wilson, 1 Ch. 309.

[8] See *post*, p. 543.

If an excavation is made so near to a highway as to amount to a public nuisance, and a private injury ensues, an action will lie.[1] However, the owner of an unfenced quarry, which adjoins a public road, but is not so near as to be dangerous to persons using the road in the line of the road, is under no liability to a person who deviates from the road and falls into the quarry.[2] Under section 20 of the Pub. Health Acts Am. Act, 1907, a person may be liable to fence an excavation; although the greater part of it consists of a chalk pit, which he does not own.[3] Fencings near highways.

(β) Rights under Railways and Waterworks Clauses Acts.

The mining sections of the Rail. Cl. Cons. Act, 1845,[4] and the Wat. Cl. Act, 1847,[5] have been already stated *in extenso*.[6] By far the larger number of cases decided thereunder have been cases involving the right to support. But some have been cases of quarrying. It will be remembered, in connection therewith, that the word "mines" in the sections in question cannot be confined to underground workings. If any mineral clearly within the meaning of the sections (as, for example, coal, ironstone, or slate, which are expressly mentioned) crops out at any part of the surface taken for railway or waterworks purposes, and requires accordingly in the ordinary course to be got by surface workings, such workings are "mines of minerals" within the sections, and excepted accordingly.[7] Generally.

Where a railway company purchase land under the sections, but do not purchase the mines, and the land contains ironstone ordinarily got by surface operations, the landowner is entitled to give notice of his intention to work it by surface operations, although the result may be destructive of the surface. This was so decided in *Midland Railway Co.* v. *Robinson*,[8] the facts of which have been already stated.[9] The Railway company—Mid. Rail. Co. *v.* Robinson.

[1] Barnes *v.* Ward, 9 C. B. 392: see also Hounsell *v.* Smyth, 7 C. B., N. S. 731.

[2] Hounsell *v.* Smyth, *sup.*: cf. Blyth *v.* Topham, Cro. Jac. 158. See further, as to neglect to fence excavations, *ante*, pp. 458, 459, and as to fencing under the Regulation Acts, see *post*, chap. xxi.

[3] Carshalton, &c., Council *v.* Burrage, 1911, 2 Ch. 133.

[4] 8 & 9 Vict. c. 20.

[5] 10 & 11 Vict. c. 17.

[6] *Ante*, pp. 370—379.

[7] *Ante*, pp. 34, 48—50.

[8] 15 A. C. 19.

[9] *Ante*, p. 40; see also *ante*, pp. 405—407.

assumption made in the same case that limestone stood upon a similar footing; and its incorrectness; have also been already stated.[1]

Right to enter on surface and break it up.

And if the railway company refuse to compensate the landowner, he is entitled to follow up the notice by actually entering upon the surface and breaking it up. This proposition was really involved in *Midland Railway Co.* v. *Robinson.*[2] It was not, however, expressly decided there; and, prior to *Ruabon Brick, &c., Co.* v. *Great Western Railway Co.*,[3] it might possibly have been regarded as open to some doubt. For, although there were dicta, and one actual decision, in favour of it, there were also dicta against it. Before referring to these dicta and decisions, the language of section 79 of the Rail. Cl. Act will be remembered.[4] A mine owner, left at liberty to work his mines, must work them "in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district."

Dicta, &c., in favour of right to enter.

The dicta and decision in favour of the right to enter are as follows:—In *Great Western Railway Co.* v. *Bennett*[5] Lord Chelmsford said,[6] that the section left the mine owner at liberty "to work his mines exactly as he would if the surface belonged to him;" and in the same case Lord Cranworth said,[7] that, when the mine owner proceeded to work, he was entitled to be "just in the same position as if he had never sold any part of the surface at all." In *Errington* v. *Metropolitan Railway Co.*[8] Jessel, M. R., said: "If they do not buy them, the owner, after thirty days' notice, may break the surface and dig up the gravel and clay." In *Midland Railway Co.* v. *Haunchwood, &c., Co.*[9] Kay, J., said, that where the "usual" mode of working surface minerals was by open workings, the company in question were not entitled to say that open workings would involve a trespass upon their property, and were therefore unlawful. The company would otherwise be enabled to prevent surface minerals from being worked at all.[10] In

[1] *Ante*, pp. 40, 45, 46.

[2] See Ruabon Brick, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 449, 461, 462, 463, *per* Bowen, L. J.

[3] 1893, 1 Ch. 427.

[4] See *ante*, p. 372.

[5] L. R. 2 H. L. 27.

[6] At p. 38.

[7] At p. 40.

[8] 19 Ch. D. 571, 572.

[9] 20 Ch. D. 552.

[10] Pp. 560, 561. The actual decision in this case was in effect overruled by Glasgow *v.* Farie, 13 A. C. 657: see *ante*, pp. 32, 39, 40.

Midland Railway Co. v. *Miles*,[1] Stirling, J., decided that the owner of mines on both sides of a railway,[2] the usual mode of working which was by surface operations, was entitled to go from one side to the other by passages under the railway; and, when he got to the latter side, to work the mines there by surface operations. And in *Midland Railway Co.* v. *Robinson*,[3] observations were used to the following effect:—If the usual mode of working is by open quarrying, the mine owner is entitled to work by open quarrying. The words "beneficial working" are words of qualification intended for the benefit of the mine owner, so as to enable him "to win the largest quantity of minerals that the mine will yield," consistently with its being worked properly, and according to the usual mode of working in the district.[4]

Dicta against it.

On the other hand, in *Pountney* v. *Clayton*,[5] Lord Esher said, that "any one, who by digging the land, and not by the operation of mining, were to let down the surface, on which was the railway, would be a trespasser, as he would be digging on the land of the railway company." And, in *Midland Railway Co.* v. *Robinson*,[6] Lord Macnaghten said: "I do not think that it necessarily follows from that circumstance" (*i.e.* that a railway company is not entitled to support) "that a mine owner, who is entitled to withdraw support by working his mines in the ordinary course, if the company do not compensate him, is entitled to enter upon the surface, which unquestionably belongs to the railway company, and break it up by working from the surface."

Ruabon Brick, &c., Co. *v.* G. W. Rail. Co.

However, any doubt on the subject has now been removed by *Ruabon Brick, &c., Co.* v. *Great Western Railway Co.*,[7] the facts of which were as follows:—The plaintiffs acquired the land in question for the purpose of working terra cotta clay, which it contained, and which nearly came up to the surface. They subsequently entered into an agreement with the

[1] 33 Ch. D. 632: see pp. 638, 645—648.

[2] Railway A referred to in the statement of the facts of this case given *ante*, pp. 417–419.

[3] 37 Ch. D. 386, 15 A. C. 19.

[4] See Mid. R. Co. *v.* Robinson, 37 Ch. D. 392, 393, *per* Chitty, J., 15 A. C. 27, *per* Lord Herschell; see the observations of Lord Chelmsford in G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 39, cited *ante*, p. 382.

[5] 11 Q. B. D. 833.

[6] 15 A. C. 36.

[7] 1893, 1 Ch. 427.

defendants, which provided (*a*) that, if the defendants obtained compulsory powers, they should purchase from the plaintiff a railway which had been made across the land, and (*b*) that in the event of the plaintiffs working the clay the defendants might enter and provide support by constructing brick or stone pillars. The defendants obtained their Act; and purchased the railway site, the conveyance excepting the clay. The plaintiffs gave notice of their intention to work, and the defendants gave no counter-notice. Having regard to the agreement, the defendants were indifferent to questions as to support. But the plaintiffs proceeded to get the clay, not by underground working, but by open quarrying; and for that purpose, to remove the soil and ballast on which the rails were laid. The custom of the district was to get the clay by open quarrying. It was held, that the plaintiffs had acted within their rights. It was admitted, that the plaintiffs would have had a right to withdraw support from the surface; [1] and it was considered, that there could be no distinction between one kind of destruction and another. "It is destruction in different ways, it is true. It is destruction in the one case by picking the surface up, and destruction in the other case by letting the surface down. The result is the same—destruction of the railway." [2] If this were not the result of the sections in question, they would exclude the rights of the owner of ironstone ordinarily got by surface operations.[3] They would, moreover, make it almost impossible to assess the amount which the railway company would have to pay. For the railway company "would have to purchase it when they purchased the land, . . ." and at that time you could not tell "the exact chances of the mine owner wishing to work his quarry, or the extent or depth to which he would work." But this would defeat the whole object of the sections.[4]

Waterworks company.

There is a difference in language between the power of a railway company, and that of a waterworks company to work, in the absence of a counter-notice; and there may also be a

[1] *Ante*, p. 422.

[2] 1893, 1 Ch. 453, 454, *per* Lindley, L. J.: see also pp. 464, 465, *per* Smith, L. J.

[3] 1893, 1 Ch. 458, *per* Bowen, L. J.: see *ante*, pp. 34, 35, 48—50.

[4] 1893, 1 Ch. 458, 459, 460, *per* Bowen, L. J.: see also *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 466, 467; G. W. R. Co. *v.* Blades, 1901, 2 Ch. 631; G. W. R. Co. *v.* Carpalla, &c., Co., 1909, 1 Ch. 218.

difference in the result, so far as regards the right of withdrawing support. This question has been already dealt with.[1] If there is a difference in the result so far as regards the right of withdrawing support, there is a similar difference so far as regards the right of quarrying.

Law as to mining communications consistent.

It has been already seen, that, under the section allowing him to make mining communications, a mine owner will not be permitted to enter upon and across a line of railway; in order to reach and work his minerals on the other side.[2] But there is nothing inconsistent in his disability in this respect, and his right to break up a line of railway; in order to work minerals under it, for which the railway company will not pay.

Improper exercise of right.

While, however, the landowner is entitled, if he is not compensated, to work minerals by surface operations, if that be the usual course of working, he is liable, if, in so doing, he does not do all that is right and reasonable for the protection of the company.[3]

[1] See *ante*, pp. 396—404, 421, 422.
[2] See *ante*, p. 417.
[3] Ruabon Brick, &c., Co. *v.* G. W. R. Co., 1893, 1 Ch. 436, *per* Kekewich, J.

CHAPTER XVI.

NEIGHBOURS—ROADWAYS.[1]

a.—NATURE OF RIGHT OF WAY—GENERALLY.

Right of way is an easement.

A RIGHT of way *in alieno solo* [2] is an incorporeal right by way of easement.[3] And it is none the less an easement because it may be a necessary incident to the enjoyment of his property by the dominant owner.[4]

Servient owner may use or alter the way.

The dominant owner cannot prevent the servient owner from using the way. If he could, his right of way would not be an easement, but a right of property in the land occupied by the way.[5] Nor can he prevent the servient owner from making alterations in the way, provided that it is not thereby rendered an obstruction to the dominant owner.[6]

Right must generally originate in grant or prescription.

The Crown has apparently a right of way for the carriage through the lands of a subject of the produce of mines of gold and silver ; [7] and also of saltpetre ; [8] and probably of treasure trove.[9] Subject to this, a right of way *in alieno solo*, being an

[1] The general principles, which apply to questions of support, apply equally to the questions discussed in this chapter. See, as to support, *ante*, pp. 287, 288.

[2] As to rights of way *in proprio solo*, see *ante*, pp. 101—105, 118, 119.

[3] Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 492, 495 ; Ramsay *v.* Blair, 1 A. C. 706, *per* Lord Selborne.

[4] See Ramsay *v.* Blair, *sup.*, *per* Lord Selborne. It is respectfully submitted, that the propositions laid down by Lord Chelmsford at p. 703 are not consistent with principle. Cf. Bourne *v.* Taylor, 10 East, 205.

[5] See R. *v.* Jolliffe, 2 T. R. 95. In R. *v.* Bell (7 T. R. 598) it was decided, that the grantee of a wayleave for carrying coal was rateable to the poor as occupier ; but only because he had inclosed the way, and excluded all persons from using it.

[6] Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 821, 823. A right of way cannot, properly speaking, be the subject of an exception, or a reservation. For it is neither part of the thing granted ; nor does it, like a rent, issue out of the thing granted. Where a grantor purports to except or reserve a right of way, it really takes effect as an easement newly created by way of express regrant by the grantee. See Durham, &c., Co. *v.* Walker, 2 Q. B. 940 ; Proud *v.* Bates, 34 L. J. Ch. 406 ; Hamilton *v.* Graham, L. R. 2 Sc. & D. 168.

[7] See *ante*, p. 455.

[8] See *ante*, p. 455, n. [11].

[9] See *ib.*

incorporeal right by way of easement,[1] must have its origin in grant, express or implied; or in prescription. A right of way by prescription may be acquired at common law either by an enjoyment from time immemorial; or, upon the fiction of a modern lost grant, by an enjoyment for twenty years. Or, it may be acquired under section 2 [2] of the Prescription Act [3] by an enjoyment as of right.[4]

b.—EXPRESS GRANT—INSTRUMENTS INTER PARTES AND INCLOSURE AND CANAL ACTS.

(*a*) *Kind of Way.*

Unlimited grant.

Where there is a general and unqualified grant of the way intended to be made or used, the grantee may make or use any kind of way he pleases.[5]

Grant clearly limited.

Where the way intended to be made or used is clearly defined by the instrument of grant, and there is nothing in the instrument to indicate a contrary intention, the grantee of the right cannot make or use any other kind of way than that which has been granted. He cannot, for instance, where a right of passage *simpliciter* is granted, make or use a tramway or railroad; [6] or, where a right of waggon-way is granted, make or use a tramway or railroad.[7] And he cannot justify the making or using a different kind of way from that which has been granted on the ground, that no more land has been thereby taken, or that the landowner has not been thereby in any respect injured. He has no right to take the land at all, except for the particular kind of way indicated.[8]

[1] See preceding page.

[2] Cited *ante*, p. 322, n. [3].

[3] See Monmouth Canal Co. *v.* Harford, 1 Cr. M. & R. 614; Cowling *v.* Higginson, 4 M. & W. 245; Rogers *v.* Taylor, 1 H. & N. 706; Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812.

[4] Monmouth Canal Co. *v.* Harford, *sup.*; Cowling *v.* Higginson, *sup.* For claims to rights of way for mining purposes based on expectation followed by expenditure, see Clavering's Case, 5 Ves. 690; Powell *v.* Thomas, 6 Ha. 300; Meynell *v.* Surtees, 3 Sm. & G. 101. Clavering's Case appears to have been approved by James, V.-C., in Bankart *v.* Tennant, 10 Eq. 141, but it was disapproved by Fry, J., in Willmott *v.* Barber, 15 Ch. D. at 104, and it is not consistent with the latter decision. See also Bell *v.* Mid. R. Co., 3 De G. & J. 686; Mold *v.* Wheatcroft, 27 Beav. 510, 516.

[5] See Beaufort *v.* Bates, 3 De G. F. & J. 393.

[6] Beaufort *v.* Bates, 3 De G. F. & J. 392; Neath Canal Co. *v.* Ynisarwed Coll. Co., 10 Ch. 450.

[7] See Farrow *v.* Vansittart, 1 R. C. 609; Bidder *v.* North Staff. R. Co., 4 Q. B. D. 429. Cf. the law, where the right is claimed by prescription, *post*, pp. 484, 485.

[8] Farrow *v.* Vansittart, *sup.* 609, 610.

Grant not clearly limited—physical surroundings.

Where the way intended to be made or used is not clearly defined by the instrument of grant, the grantee is not entitled to make or use any kind of way he pleases, without regard to the circumstances of the case, or the necessities of his position.[1] If, for instance, one end of the way in question runs into and forms part of a public highway, over which parties do not presumably contemplate making railways or tramways, it will not be presumed that it was intended to be used as a railway or tramway.[2]

Grant not clearly limited—construction—Senhouse *v.* Christian.

In *Senhouse* v. *Christian*,[3] a grant was made of a "free and convenient way, as well an horseway as a footway, as also for carts, waggons, wains, and other carriages whatsoever, in, through, over, and along" a slip of land, for the purpose of carrying coals from a colliery to the common highway. The grantee could not commodiously carry the coals unless by laying down a framed waggon-way; and this he was accordingly held entitled to do.

Dand *v.* Kingscote.

So in *Dand* v. *Kingscote*.[4] There was there a grant of lands, "excepting and reserved out of the grant all mines of coal within the fields and territories of Amble aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits." The Court held the words "sufficient wayleave" to mean such a description of wayleave as would be reasonably sufficient to enable the coal owner to get from time to time all seams of coal to a reasonable profit.[5]

Bishop *v.* North.

In *Bishop* v. *North* [6] an Act of 32 Geo. 3, for making a canal, empowered the owners of any mines of coal within certain parishes to make any railways or roads to convey their coals to the canal over the lands of any person; making satisfaction for the damage thereby occasioned. It was held, that the Act empowered such owners to make railways to be traversed by

[1] See Farrow *v.* Vansittart, *sup.* 609. There the grant was of "free ingress, egress, and regress, wayleave and passage, to and from" mines.

[2] Bidder *v.* North Staff. R. Co., 4 Q. B. D. 430. Cf. Beaufort *v.* Bates, 3 De G. F. & J. 393, 394.

[3] 1 T. R. 560.

[4] 6 M. & W. 174.

[5] Cf. Bidder *v.* North Staff. R. Co., *sup.* 429, 430. In Pit *v.* Claverinth, 1 Barn. 318, a grant of a "convenient wayleave for the carriage of coal through a waste," was held not to entitle the grantee to a right of waggon-way: but this case must be taken to be overruled by Dand *v.* Kingscote.

[6] 11 M. & W. 418.

locomotive engines. In *Bishop* v. *North* there was a compensation clause for the damage which might be occasioned by the making of the way; and it seems clear, that the decision would not have been the same, if this clause had been absent. It would have been a serious thing to hold, that, under such a grant as was there used, the servient owner was without a remedy of any kind; although his land was cut and levelled; and he was precluded from thereafter using it, except in one particular way, and with carriages of one particular construction.[1] There was not, moreover, in *Bishop* v. *North*, any suggestion, that the running of locomotives would create a public or private nuisance, or be a source of danger to the neighbourhood. In all such cases the probability or improbability of a nuisance being created, or of accidents occurring, is a material element in arriving at a decision.[2] It will be noticed, that in *Bishop* v. *North* the instrument in question was an Act of 32 Geo. 3. The mere circumstance, therefore, that locomotive engines were not in use at the date of the instrument, and could not, accordingly, be presumed to have been within the contemplation of the legislature, was considered immaterial.[3]

Bidder *v.* North Staff. Rail. Co.

Bidder v. *North Staffordshire Railway Co.*[4] was differently decided. There, however, the grant was not, as in *Senhouse* v. *Christian*, *Dand* v. *Kingscote*, and *Bishop* v. *North*, a grant of a way in any place convenient for the working; for the purposes of the working; and for the exclusive use of the grantee. It was, on the contrary, a grant of a way in a particularly defined place. It was not a grant for the purposes of the working. And it appeared to be for the use of others as well as of the grantee; the grantee being under an obligation to maintain and keep in repair the subject-matter of the grant.[5]

[1] However, in Dand *v.* Kingscote, 6 M. & W. 174, there was no compensation clause for injuries done by making ways; and the Court nevertheless intimated, that a question (which was raised, but not decided) as to the coal owner's right to make a railway, with cuttings and embankments, and fenced in so as to exclude the surface owner, was at all events arguable. Cf. Bidder *v.* North Staff. R. Co., 4 Q. B. D. 412, 430.

[2] See Bishop *v.* North, 11 M. & W. 426, 427; Bidder *v.* North Staff. R. Co., *sup.* 412, 430.

[3] See also Senhouse *v.* Christian, 1 T. R. 567; Dand *v.* Kingscote, *sup.*; McDonnell *v.* Kenneth, 1 Ir. C. L. Rep. 113.

[4] 4 Q. B. D. 412.

[5] See pp. 429, 430. Affirmed by the House of Lords: nom. Elliot *v.* North Staff. R. Co., W. N. 1881, p. 52.

One liberty restricted by another.

Where, to a liberty to make and use roads and ways, there is added a liberty to do all such other acts as may be deemed necessary or expedient for "conveying the iron ore to the furnaces and other works on the lands," it is probable, that, having regard to the latter liberty, railroads and tramways are not included in the former.[1]

(β) *Application.*

Unlimited grant.

Where the purposes, for which a way may be applied, are granted generally, and without qualification, the grantee may use the way for any purpose he thinks proper.[2]

Grant clearly limited.

Where the purposes, for which a way may be applied, are specified in the instrument of grant, and there is nothing in the instrument to indicate a contrary intention, the grantee of the right cannot use the way for any other purpose than the particular purpose for which the grant is made.[3] Where, for instance, the way is granted for all purposes except that of carrying minerals ;[4] or for agricultural purposes ;[5] or for other definite purposes, not including mining or quarrying purposes ;[6] it cannot be used for mining or quarrying purposes. So, where there is a grant of a right of way for the carriage of minerals, the way cannot be used for general purposes ;[7] or for the conveyance of passengers.[8] So, where a right of way is granted for the conveyance of minerals from a particular mine, the way cannot be used for the conveyance of minerals from any other mine.[9] So a grant of a right of way for carrying minerals to or from a

[1] See Beaufort *v.* Bates, 3 De G. F. & J. 381, 393, 394.

[2] Hughes *v.* Chester, &c., R. Co., 3 De G. F. & J. 352 ; reversing Chester, &c., R. Co. *v.* Hughes, 1 Dr. & Sm. 524.

[3] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 169 : see also Stafford *v.* Coyney, 7 B. & C. 257 ; Cowling *v.* Higginson, 4 M. & W. 245. See also Dand *v.* Kingscote, 6 M. & W. 174 ; Farrow *v.* Vansittart, 1 R. C. 609 ; Durham, &c., Co. *v.* Walker, 2 Q. B. 940 ; Midgley *v.* Richardson, 14 M. & W. 595 ; Bowes *v.* Ravensworth, 15 C. B. 512 ; Hedley *v.* Fenwick, 3 H. & C. 349 ; Proud *v.* Bates, 34 L. J. Ch. 406.

[4] Stafford *v.* Coyney, *sup.*

[5] Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812.

[6] Cowling *v.* Higginson, 4 M. & W. 245.

[7] Durham, &c., Co. *v.* Walker, 2 Q. B. 240 ; Meynell *v.* Surtees, 3 Sm. & G. 117, 118.

[8] Farrow *v.* Vansittart, 1 R. C. 609 ; Durham, &c., Co. *v.* Walker, *sup.*

[9] Dand *v.* Kingscote, 6 M. & W. 174 ; Durham, &c., Co. *v.* Walker, *sup.* See also Newmarch *v.* Brandling, 3 Swanst. 99, 107, 108 ; and cf. Farrow *v.* Vansittart, *sup.*

particular place, as a terminus, will not justify going over that place to or from another place beyond it.[1] And a mine owner cannot justify the user of a way for any other purpose than the particular purpose for which the grant has been made, on the ground, that no substantially greater burden has been thereby put upon the servient tenement.[2]

Grant not clearly limited.

Where the purposes, for which a way may be applied, are not clearly defined by the instrument of grant, the grantee is not entitled to apply it for any purpose he pleases; without regard to the circumstances of the case, or the necessities of his position.[3] The grantee may, however, in such a case, claim the right to apply it for some particular purpose; and this claim may be contested by the servient owner.

Construction —Dand *v.* Kingscote.

In *Dand* v. *Kingscote*,[4] the owner of two adjoining pieces of land conveyed them by separate deeds to different persons. There was in one of the deeds an exception and reservation in these words:—"Excepting and reserved out of the grant all mines of coals within the fields and territories of Amble aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits." The other deed contained precisely similar words, except that "Hawxley" was substituted for "Amble." It was held, that the coal owner was not entitled to carry over the land comprised in the first deed the coal got under the land comprised in the second deed; and that, although the coal underneath both pieces of land formed part of the same mineral field.

Durham, &c., Co. *v.* Walker.

In *Durham, &c., Railway Co.* v. *Walker*,[5] there was a demise of lands to the defendant. The demise excepted and reserved the mines and quarries; with full power to dig, win, work, get, and carry away, the same; and with free ingress, egress, and regress, wayleave, and passage, to and from the same, "or to or from any other mines, or quarries, lands, and grounds." Afterwards the lessors granted liberty to the company to enter the demised lands; and to make and maintain a double way over them; and to use and grant the use of such way for the conveyance of passengers, coal, and goods. The

[1] See James *v.* Cochrane, 8 Exch. 556; *post*, p. 479.
[2] Farrow *v.* Vansittart, *sup.*
[3] *Ib.*
[4] 6 M. & W. 174.
[5] 2 Q. B. 940.

Court considered, that, under the reservation, both the wayleave to or from the excepted mines, and the wayleave to or from other mines, lands, and grounds, were only mentioned in connection with the excepted mines, and were not mentioned as a distinct matter of exception or reservation. It was, accordingly, held, that the right reserved was only that of making and using ways, and granting wayleaves for the purpose of getting the excepted minerals.

Midgley *v.* Richardson.

In *Midgley* v. *Richardson*,[1] an Inclosure Act provided, that the Bishop of Durham and his successors might work and enjoy all mines and quarries lying under the moors and commons; together with all convenient and necessary ways and wayleaves, and liberty of winning and working the mines belonging to the see wheresoever the same should be, and of leading and carrying away all the coals gotten thereout, "or out of any other lands or grounds whatsoever." There was no power under the Act of going to the mines of strangers for the purpose of working them; nor was there any compensation provided for injury from the carriage of minerals from such mines. It was held, that the Bishop was not entitled to carry over the inclosed lands coals got out of other mines, which he worked within the manor, but which did not belong to the see. The words, "or out of any other lands or grounds whatsoever," were interpreted as meaning lands or grounds other than mines; *e.g.*, quarries, chalk pits, marl pits, &c., which did not strictly come under the description of mines.[2]

Bidder *v.* North Staff. Rail. Co.

A decision more favourable to the mine owner was come to in *Bidder* v. *North Staffordshire Railway Co.*[3] There the lessees of mines were authorised to take and use "full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen or

[1] 14 M. & W. 595, 607, 608.

[2] Followed in Hedley *v.* Fenwick, 3 H. & C. 349. See also Farrow *v.* Vansittart, 1 R. C. 602 (where an exactly similar lease to that in Durham, &c., Co. *v.* Walker came before the Court to be construed); Wallis *v.* Harrison, reported together with Durham, &c., Co. *v.* Walker, in 11 L. J. Exch. 440. Cf. also Bowser *v.* Maclean, 2 De G. F. & J. 415; Jegon *v.* Vivian, 6 Ch. 742; Eardley *v.* Granville, 3 Ch. D. 826. As to the meaning of "mine," as distinguished from "quarry," see *ante*, pp. 3 *et seq.* See further, as to Midgley *v.* Richardson, *post*, p. 479.

[3] 4 Q. B. D. 412, 430, 431, affirmed by the House of Lords nom. Elliot *v.* North Staff. R. Co., W. N. 1881, p. 52.

others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, the produce of the mines thereby demised, or any other mines." It was considered, that the authority was limited to mines worked by the lessees; but that, even if this were not so, there was no ground for putting any limitation whatsoever on the generality of the language of the lease.

James v. Cochrane.

A decision favourable to the mine owner was also come to in *James* v. *Cochrane*,[1] where the language of a grant, referring in other respects to a particular place as a terminus, was held to entitle the grantee to use it as a thoroughfare. There the lessees of a mine covenanted to leave unworked a barrier of coal between the demised mine and the adjoining mines; and not to open any communications in such barrier, except where the lease gave them liberty to do so. The liberty was to make communications through the barrier for the purpose of conveying underground coals gotten in any adjoining colliery from such colliery into the demised mine; and to convey such coals accordingly; and from thence to "convey and carry away" all such coals; "and also to draw to bank at any of the pits sunk or to be sunk" in the demised lands the coals from such adjoining colliery. No pits were ever sunk by the lessees in the demised lands. It was held, that the lessees had liberty to carry the coal of adjoining mines through a breach in the barrier into the demised mine; and thence, through another breach in the barrier, into adjoining mines on the other side; and to raise it to the surface through shafts in the last-mentioned mines.[2]

Construction and surrounding circumstances—Midgley v. Richardson.

And, if, independently of the language of the grant, it is reasonable, from the circumstances of the case, to make a presumption in favour of the owner of the mine or quarry, a construction may be adopted, which might not otherwise be adopted. Thus, in *Midgley* v. *Richardson*,[3] an Inclosure Act contained a saving of the rights of the Bishop of Durham as lord of the manor. The other material provisions of the Act have been already stated.[4] It was probable that, at the passing of the Act, the Bishop was in the habit of carrying over the inclosed lands coals from mines wherever situate; and he had only received a very small compensation for the allotment.

[1] 8 Exch. 556.

[2] See further, as to this case, *ante*, p. 239.

[3] 14 M. & W. 595.

[4] *Ante*, p. 478.

It was held, that he was entitled to carry over the inclosed lands, not merely the coals got within those lands, but also those got out of any other mines belonging to the see. The Court observed that, having regard to his probable position at the passing of the Act, and to the amount of compensation which he had received, it was reasonable to presume as far as possible in the Bishop's favour.[1]

Bowes *v.* Ravensworth.

So in *Bowes* v. *Ravensworth*.[2] There an Inclosure Act enacted that nothing therein contained should be construed to prejudice the rights of the lord of the manor as such lord; but that the lord should enjoy all mines, minerals, and quarries belonging to the manor, in as full and ample a manner as if the Act had not been made; with liberty to make ways along the waste lands intended to be inclosed; and to do every other act then or thereafter in use for working, leading, and carrying away the said mines, minerals, and quarries; and also for "leading, carrying, and conveying the coals and produce of any other mines and minerals from or under any other lands and grounds whatsoever." The lord constructed a railway, and used it for the purpose of carrying coke; which, however, was not made from coal worked out of the wastes in question. It was held, that "produce of any other mines and minerals" did not mean produce of mines and minerals other than coals, but produce of mines and minerals other than the mines, minerals, and quarries before mentioned; and that the mine owner was, therefore, justified in his user.

Proud *v.* Bates.

So in *Proud* v. *Bates*.[3] In that case (the facts of which have been already sufficiently stated [4]) the lessor claimed a right to carry along the way in question, as well minerals worked within the excepted mines, as also minerals within the manor, although not under the demised property. It was held,[5] that the lessor was entitled to an absolute wayleave, and not merely to a right of way for the purpose of working the excepted minerals. The Court observed, that the circumstance of the lessor having been owner of the entire manor favoured the presumption, that it was not intended, that the wayleave should be used merely for working the excepted minerals.

[1] See further, as to this case, *ante*, p. 478.
[2] 15 C. B. 512.
[3] 34 L. J. Ch. 406.
[4] *Ante*, p. 103.
[5] *Per* Wood, V.-C.

The Court also observed, that, if the wayleave were of the restricted kind contended for, the mine owner would not have obtained any larger powers than he would have obtained by implied grant, if there had been a mere exception of the mines, without more;[1] and that, this being so, it was reasonable to infer, that, what was expressed widely, was not intended to have a restricted effect. This reasoning was evidently approved of by the same learned Judge in a more recent case.[2] But it does not seem to have been considered in the preceding cases.[3]

(γ) *Direction—Dimensions—Construction—Maintenance.*

Where direction limited.

Where the direction, which the way may take, is indicated with sufficient clearness, the grantee of a right of way cannot, *primâ facie*, make or use a way in any other direction. Thus, the grantee of a free and convenient way "in, through, over, and along" a slip of land, was held not to be entitled to make a transverse way across the land.[4]

Where direction not limited.

Where the direction, which the way may take, is not indicated with sufficient clearness; as where the words used are "free ingress, egress, and regress, wayleave, and passage to and from" the mines in question; the grantee is not entitled, at pleasure, to make a way in any direction, without regard to the necessities of his workings.[5] And his right in such a case to make the way in a particular direction will usually depend on whether he acts with reasonable skill and discretion.[6] If, however, he does so act, he will not be confined to the shortest practicable course to the terminus, to which his minerals are to be carried; if a more circuitous route would be more beneficial.[7] Nor will he be confined to the shortest course to the nearest highway in the direction of that terminus, and no further; if, by traversing the highway, he could work at less expense.[8] If the

[1] See *ante*, p. 451.

[2] Hamilton *v.* Graham, L. R. 2 Sc. & D. 175.

[3] See Dand *v.* Kingscote, 6 M. & W. 174; Durham, &c., Co. *v.* Walker, 2 Q. B. 940; Midgley *v.* Richardson, 14 M. & W. 595; Bowes *v.* Ravensworth, 15 C. B. 512. Cf. Batten Pooll *v.* Kennedy, 1907, 1 Ch. 256 (as to which see *ante*, p. 3).

[4] Senhouse *v.* Christian, 1 T. R. 560.

[5] Farrow *v.* Vansittart, 1 R. C. 609.

[6] Abson *v.* Fenton, 1 B. & C. 195.

[7] See Richards *v.* Richards, Joh. 255.

[8] See Dand *v.* Kingscote, 6 M. & W. 174, where the grantee twice traversed a highway: see p. 179.

dominant owner is, in other respects, justified in selecting a particular direction for his way, he cannot be prevented from so doing, merely because that direction involves a trespass upon the lands of third parties.[1] And the grantee of a "convenient wayleave" may not, as far as direction is concerned, be confined to such a way, as was convenient at the time the grant was made; if, at a subsequent time, a way in another direction is more convenient.[2] And, in all cases, the grantee, and not the grantor, of a "convenient" or "sufficient" wayleave is, *primâ facie*, the judge of the direction which will be convenient or sufficient.[3] However, if such a grantee makes a way in a particular direction, and immediately or very shortly afterwards abandons it, and makes a way in another direction, he may be made liable for the injury he thereby does the land. For, by his abandonment of the former way, he has shown that that way was unnecessary.[4] And the dominant owner may in all cases be made liable, if he acts *malâ fide*.[5]

Dimensions. In *Proud* v. *Bates* [6] (the facts of which have been already sufficiently stated [7]), the lessor chipped off to the height of a foot and a half a part of the soil, which lay above the excepted mines; and he claimed the right to use the way in its altered state. It was held, that he was entitled to do so.

Construction. Where the manner in which a way may be constructed, is not defined, it must be constructed in such a manner as a prudent person would have adopted, if he had been making the way over his own land, and not over the land of another.[8] And if the dominant owner judiciously designs and constructs the way, and takes no unnecessary ground, and does no unnecessary injury, he will be free from all liability.[9] But if, in making it, he does unnecessary injury to the land, as by making fences or ditches, which are not absolutely requisite, he will be liable.[10]

[1] Dand *v.* Kingscote, *sup.* 199.
[2] *Ib.* 198.
[3] Abson *v.* Fenton, 1 B. & C. 195; Dand *v.* Kingscote, *sup.*; Richards *v.* Richards, Joh. 255, 262, 263.
[4] Dand *v.* Kingscote, *sup.*
[5] Richards *v.* Richards, *sup.* 263.
[6] 34 L. J. Ch. 406.
[7] *Ante*, pp. 103, 480.
[8] Abson *v.* Fenton, 1 B. & C. 195: cf. Bishop *v.* North, 11 M. & W. 426.
[9] Dand *v.* Kingscote, 6 M. & W. 199: cf. Bishop *v.* North, *sup.*
[10] Dand *v.* Kingscote, *sup.*

The dominant owner is bound to prevent the way from becoming a nuisance to the public, or to individuals.[1] Maintenance.

c.—EXPRESS GRANT—PUBLIC GENERAL ACTS.

The Rail. Cl. Cons. Act, 1845,[2] and the Wat. Cl. Act,[3] contain provisions as to communications, which mine owners may make through the intervening mines between the mines on both sides of the railway or works for the purpose of working the latter mines. These provisions and the decisions thereon have been already mentioned.[4] Rail. Cl. Cons. Act—Wat. Cl. Act.

The Highways Acts, 3 Geo. 4, c. 126, and 5 & 6 Will. 4, c. 50, give rights of way for the carriage of materials for roads.[5] Rights of way for mining purposes may also be exercised under the Incl. Act, 22 & 23 Vict. c. 43 ;[6] by the Duke of Cornwall and his lessees under the Act 7 & 8 Vict. c. 105 ;[7] by the Crown and persons claiming under it under the Cornwall Subm. Mines Act, 1858 ;[8] by the Crown in respect of the foreshore, or the adjacent lands, under the Crown Lands Act, 1866 ;[9] and, in respect of lands in Ireland, under the Acts 23 & 24 Vict. c. 154, 33 & 34 Vict. c. 46, and 44 & 45 Vict. c. 49.[10] Other statutory grants.

d.—IMPLIED GRANT—WAY OF NECESSITY.

The doctrine as to a way of necessity has been thus stated : —" If I have a field inclosed by my own lands on all sides, and I alien this close to another, he shall have a way to this close over my land as incident to the grant : for otherwise he cannot have any benefit by the grant." [11] Meaning of way of necessity—surface barrier.

The doctrine of a way of necessity does not merely enable a mine owner, who owns an overlying landlocked surface, to conduct over the surrounding land of his grantor the minerals which he brings to such surface. It enables a mine owner, who would otherwise have no right to use the overlying land Horizontal barrier—sinking to reach and work.

[1] See Bishop *v.* North, *sup.*, *per* Parke, B.
[2] 8 & 9 Vict. c. 20.
[3] 10 & 11 Vict. c. 17.
[4] *Ante*, pp. 416 *et seq.*
[5] *Ante*, p. 132.
[6] *Ante*, pp. 459, 460.
[7] *Ante*, pp. 460, 461.
[8] *Ante*, pp. 462, 463.
[9] *Ante*, p. 463.
[10] *Ante*, pp. 463, 464.
[11] See Rolle's Abr. tit. " Graunts," Z. p. 17 ; Simpson *v.* Tellwright, 2 Lutw. 519.

at all, to sink through such land from the surface to the mines in order to reach and work them.[1] And whether, if it be shown that the process of sinking will inevitably let loose a body of water within the overlying land, and thereby ruin it, it will be restrained,[2] it will certainly not be restrained, if the anticipated danger is shown to be visionary.[3]

Vertical underground barrier.

Nor is the doctrine confined to the case of a surface barrier, or to the case of a horizontal barrier. It may equally apply to the case of a vertical underground barrier.[4]

Railways and waterworks.

Where a railway had been compulsorily constructed through land under an old Railway Act; and the closes on either side contained minerals; and the owner constructed transversely across the railway another railway for the professed purpose of carrying minerals from one close to the other; it was held, that, if his railway was constructed for the necessary occupation of the closes, he was justified in constructing it.[5] A way of necessity is sometimes claimed in respect of property subject to the Rail. or Wat. Cl. Act.[6]

Limits of right.

A way of necessity must be claimed *bonâ fide*. It cannot be claimed for a collateral purpose.[7] And it ought not to be of larger dimensions than are reasonably requisite.[8]

e.—PRESCRIPTION.[9]

Generally.

The kind of way which may be used, and the purposes for which it may be applied, where a right of way arises by prescription, are two questions which may be considered together. An user by prescription of a right of way of a particular kind, or for a particular purpose, will not justify an user of a way of any other kind which is more onerous, or for any other purpose which is more onerous.[10] Whether it will necessarily justify an user of a way of any other kind not being more

[1] See Goold *v.* Gt. West. Coal Co., 2 De G. J. & S. 600; *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 466, 471. Cf. Rogers *v.* Taylor, 1 H. & N. 706.

[2] See *post*, pp. 511, 512.

[3] See Goold *v.* Gt. West. Coal Co., *sup.* 610 *et seq.*

[4] See *Re* Gerard and L. & N. W. R. Co., *sup.* 471.

[5] Monmouth Canal Co. *v.* Harford, 1 Cr. M. & R. 614, 634.

[6] See Midland R. Co. *v.* Miles, 33 Ch. D. 644; *Re* Gerard and L. & N. W. R. Co., 1895, 1 Q. B. 466, 471; and *ante*, p. 418.

[7] Monmouth Canal Co. *v.* Harford, *sup.* 614.

[8] See *ib.* 634.

[9] See s. 2 of the Prescript. Act, cited *ante*, p. 322, n. 3.

[10] See Stafford *v.* Coyney, 7 B. & C. 257.

onerous or for any other purpose not being more onerous, are questions which must be determined by reference to the cases.

In *Cowling* v. *Higginson*,[1] a plea to a trespass set up a prescriptive right of way for horses, carts, waggons, and carriages. The plaintiff admitted, that there was this right, but for farming purposes only, and contended, that the right did not extend to mining purposes. Mines under the property had been opened, although they had not been worked for seventy years.[2] It was laid down, that, if the way were confined to a particular purpose, a jury ought not to extend it; but that, if it were proved to have been used for a variety of purposes, a jury might be warranted in finding a way for all purposes.[3] Cowling *v.* Higginson.

In *Wimbledon, &c., Conservators* v. *Dixon*,[4] a road had been immemorially used to a farm; not merely for usual agricultural purposes; but, in certain instances, for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm; and for carting away sand and gravel dug out of the farm. The defendant, who was the owner of the farm, claimed a right to use the way for carting the materials required for building a number of new houses upon the land. It was considered that the defendant might have been entitled to use the farm, *quâ* farm, for all purposes according to its ordinary and reasonable use. But it was held that he had no right to alter the whole character of the farm, and then use the way for the purposes of the property in its altered condition. Wimbledon, &c., Cons. *v.* Dixon.

In *Bradburn* v. *Morris*, *Morris* v. *Bradburn*,[5] the claimant of a right of way proved, that for a period of twenty years the occupiers of the lands, in respect of which he claimed, had used an occupation road for agricultural purposes. It was held, that this was not of itself sufficient to prove a right to use the road for the purpose of getting minerals; no minerals having ever been got upon the lands in question.[6] Bradburn *v.* Morris.

[1] 4 M. & W. 245.

[2] See, as to this, Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 371.

[3] See 4 M. & W. 256, *per* Parke, B.

[4] 1 Ch. D. 362.

[5] 3 Ch. D. 812, 823.

[6] In Dand *v.* Kingscote, 6 M. & W. 174, the validity of a plea of a customary right of way, which was set up, was not considered; but, apparently, only because sufficient evidence in support of the plea was not produced.

f.—REMEDIES.

(*a*) *Interference with Right.*

Previously specified remedies.

Where a statutory remedy is specified, it should be pursued.[1]

Ordinary remedies—damages.

Subject to the necessity in proper cases of pursuing specified remedies, an action for damages will lie for obstructing a right of roadway.[2] And, although an action does not, in general, lie for a public nuisance, without special damage, yet, if a man is the owner of a colliery adjoining a public highway, and his coal-carts are stopped on the highway, this is sufficient special damage to support an action.[3]

Injunction.

The dominant owner may also, in general, have an injunction ;[4] and, if necessary, a mandatory injunction.[5] However, in order to entitle the dominant owner to a remedy, he must have a present intention to use the way for mining purposes.[6]

(*β*) *Improper User.*

Damages.

If a man, who has no property in a piece of land, and who has no right of way over or through it for the carriage of his minerals, uses it for that purpose, he may be made liable in damages.[7] And, if a man, although having a right of way over or through his neighbour's land for the carriage of his minerals, uses that land in an improper manner ; whether as respects the kind of way which he uses ;[8] or the direction which it takes ;[9] or the purpose for which he applies it ;[10] he may be made similarly liable.

Measure of damages—wayleave rent.

And the measure of damages in such a case is not, as in cases of ordinary trespass to land, the actual damage sustained

[1] See Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472.

[2] Bell *v.* Midland R. Co., 10 C. B., N. S. 287 ; Mold *v.* Wheatcroft, 27 Beav. 510, 521.

[3] Iveson *v.* Moore, 1 Ld. Raym. 486, 1 Salk. 15.

[4] Newmarch *v.* Brandling, 3 Swanst. 99 ; Bell *v.* Midland R. Co., 3 De G. & J. 673 ; Mold *v.* Wheatcroft, *sup.* For the form of the injunction, see Mold *v.* Wheatcroft, *sup.*

[5] See Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812, 820.

[6] *Ib.*

[7] Monmouth Canal Co. *v.* Harford, 1 C. M. & R. 614. See also Martin *v.* Porter, 5 M. & W. 352, 353.

[8] Neath Canal Co. *v.* Ynisarwed Colliery Co., 10 Ch. 450.

[9] Senhouse *v.* Christian, 1 T. R. 560 ; Abson *v.* Fenton, 1 B. & C. 195 ; Dand *v.* Kingscote, 6 M. & W. 199.

[10] Howell *v.* King, 1 Mod. 190 ; Stafford *v.* Coyney, 7 B. & C. 257 ; Dand *v.* Kingscote, *sup.* 195 ; Midgley *v.* Richardson, 14 M. & W. 595 ; Powell *v.* Vickerman, 3 T. L. R. 358.

by the injured party. It is the value of the land for the purposes for which it has been actually used. In other words, the injured party may obtain compensation by way of wayleave rent upon all minerals gotten out of the wrongdoer's mine which have been carried through the land of the injured party.[1] And the rate (if any) usual in the neighbourhood will furnish a convenient measure of the compensation.[2] Where, however, the injured party claims damages for wrongful abstraction, and also compensation by way of wayleave rent, and he is under the former claim held entitled to damages on the footing of a royalty only,[3] he may under the latter claim be only entitled to a nominal compensation.[4]

Injunction.

The injured party will also, in general, be entitled to an injunction to restrain the future user.[5] And for this purpose it is immaterial, that no special injury can be done him by a continuation of the user.[6] And if a man lays rails upon his neighbour's land for the purpose of carrying his minerals over them ;[7] or makes an aperture in his neighbour's land for the purpose of carrying his minerals through it ;[8] without having the right to do so ; he may, in general, be compelled by mandatory injunction to remove the rails, or to stop the aperture up.[9] A man, who does not improperly make an aperture,

[1] See Martin *v.* Porter, *sup.* ; Powell *v.* Aiken, 4 K. & J. 343 ; Hilton *v.* Woods, 4 Eq. 441, 442 ; Jegon *v.* Vivian, 6 Ch. 742 ; Phillips *v.* Homfray, *ib.* 770 ; A.-G. *v.* Tomlin, 15 Ch. D. 153 ; Whitwham *v.* Westminster Brymbo, &c., Co., 1896, 1 Ch. 898, 899, 2 *ib.* 538. In the latter case, Lindley, L. J. (1896, 2 Ch. 542), stated that Jegon *v.* Vivian had, on this point, been approved of by the House of Lords in Livingstone *v.* Rawyards Coal Co., 5 A. C. 25. For the form of an inquiry which will be made with a view to providing such compensation, see Hilton *v.* Woods, Set. 578, 579 ; Jegon *v.* Vivian, 6 Ch. 762, 763, Set. 578 ; Phillips *v.* Homfray, 6 Ch. 776. Cf. the cases of tipping spoil, *ante*, p. 458.

[2] See Whitwham *v.* Westminster Brymbo, &c., Co., 1896, 1 Ch. 898, 899 ; 2 *ib.* 543.

[3] See Livingstone *v.* Rawyards Co., 5 A. C. 25, *post*, p. 539.

[4] *Ib.* at pp. 38, 43.

[5] Powell *v.* Aiken, *sup.* ; Wright *v.* Pitt, 12 Eq. 417 ; Phillips *v.* Homfray, *sup.* ; Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 362 ; Eardley *v.* Granville, 3 *ib.* 826, 832.

[6] Powell *v.* Aiken, 4 K. & J. 343 ; Eardley *v.* Granville, 3 Ch. D. 826, 832 : cf. Goodson *v.* Richardson, 9 Ch. 221.

[7] Neath, &c., Co. *v.* Ynisarwed, &c., Co., 10 Ch. 450.

[8] Powell *v.* Aiken, *sup.*

[9] For the form of an order restraining transport, see Hilton *v.* Woods, Set. 578, 579. For the form of an injunction to restrain the making or using, or allowing to remain, any road or way, for the purpose of conveying minerals, see Eardley *v.* Granville, Set. 577. See also Baynton *v.* Leonard,

but merely improperly uses one made by a previous wrongdoer, will not be ordered himself to stop it up, and to undergo the expense necessary for that purpose.[1] But he will be ordered to give access through his property to the injured party, to enable the latter to stop it up, and to carry all materials necessary for that purpose.[2]

Death of wrongdoer.

The death of the wrongdoer may be a bar to the remedy; having regard to the maxim, *Actio personalis moritur cum personâ*. For his act is a mere personal tort, not producing any increase to his estate.[3] Where, however, the trespass has taken place within six months before the death, an action of trespass may be brought under section 2 of the Act, 3 & 4 Will. 4, c. 42. But, under the same section, the action must be brought within six months after the executor or administrator undertakes the administration. It is doubtful whether mere fraudulent concealment can ever prevent the application of the maxim.[4] It need hardly be said, that, where the wrongdoer is a company, there is no room for the application of the maxim.[5]

Phillips *v.* Homfray.

In *Phillips* v. *Homfray* [6] four inquiries were directed; including (2) what quantity of minerals had been carried through the roads or passages under the plaintiff's farm; and (3) what ought to be paid by the defendants as wayleave. While the inquiries were being proceeded with, one of the defendants died. It was held [7] that the second and third inquiries should, as against the estate of that defendant, be stayed.[8]

ib. 576; Bell *v.* Joell, *ib.* 575. For the form of an injunction to restrain the laying, or the permitting to remain, rails, tram-plates, sleepers, and other articles on the plaintiff's land, see Neath, &c., Co. *v.* Ynisarwed, &c., Co., *ib.* 557. And for an interlocutory injunction to restrain the construction of a railway or tramway for mineral purposes, see Holden *v.* Hargreaves, *ib.* 577.

[1] See Powell *v.* Aiken, *sup.* 343, 357.

[2] *Ib.* For the form of the order, see p. 360.

[3] Phillips *v.* Homfray, 6 Ch. 770; 24 Ch. D. 444, 446, 454, 455, 463, 464, 476: see also Batthyany *v.* Walford, 36 Ch. D. 279. Cf. the law in the case of wrongful abstraction of minerals, *post*, p. 550.

[4] See Phillips *v.* Homfray, 24 Ch. D. 451, 463, *per* Cotton and Bowen, L. JJ.

[5] *Ib.* 44 Ch. D. 702.

[6] 6 Ch. 770; 24 Ch. D. 439.

[7] By the Court of Appeal (24 Ch. D. 439), *per* Cotton and Bowen, L. JJ., *dissentiente* Baggallay, L. J.; overruling, on this point, the decision of Pearson, J.

[8] An appeal was presented to the House of Lords, but was out of time, and was dismissed on this ground: 11 A. C. 466. As to the first inquiry in this case, see *post*, p. 550; and as to the fourth, see *ante*, p. 450.

CHAPTER XVII.

NEIGHBOURS—WATER AND AIR.[1]

Sect 1.—WATER—USING AND ABSTRACTING.[2]

a.—WATER FLOWING NATURALLY—DEFINED COURSE.

(*a*) *Surface Water—Generally.*

Ennor *v.* Barwell.

It is sometimes difficult to determine, whether surface water, which flows naturally, also flows in a defined course. In *Ennor* v. *Barwell*,[3] the plaintiff complained of the diversion by the defendant of two different streams of water, which otherwise would have found their way to the plaintiff's mine, and have been utilised by him. The water of the first stream, which was supplied by accumulation and percolation, afforded a continuous supply to surface springs; and it flowed, sometimes in abundance, at other times in a scanty degree, from these springs in a natural course into the plaintiff's mine. From the nature and situation of the surface springs, the course of the flow was not very deeply furrowed or accurately defined; but the water could not, at the same time, have been described as water casually falling and occasionally diffused along the surface. The second stream of water rose to the surface in a place so close to the boundary of the plaintiff's mine, that there was not, in fact, sufficient distance to admit of a regular or defined channel being furrowed; but the supply was, at the same time, both copious and continuous. In respect of both these streams it was held, that the flow was defined.[4]

[1] The general principles, which apply to questions of support, apply equally to the questions discussed in this chapter. See, as to support, *ante*, pp. 287, 288.

[2] As to the right of support for land artificially covered by water, see *ante*, pp. 304—306. And as to the right of support from water, see *ante*, pp. 438—442.

[3] 2 Giff. 410, 422 *et seq.*

[4] It was held on appeal (4 L. T., N. S. 597) that the evidence as to the above-mentioned facts was too conflicting and unsatisfactory to justify a decision, and a trial at law was directed.

Artificial watercourse sometimes on same footing as natural.

The mere fact of a natural watercourse flowing in an artificial channel does not make it the less a natural watercourse.[1] And an artificial watercourse after it has been united to a natural watercourse is considered to have lost its artificial character. For it is impossible to draw any distinction between rights in a natural stream in its original state, and rights in a natural stream after it receives accessions from artificial sources.[2]

(β) *Surface Water—Natural Rights.*

General rights of riparian owner—Miner *v.* Gilmour.

The law on this subject has been thus stated:—"By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; and this, without regard to the effect, which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it; provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."[3] The right in question is *ex jure naturæ*. It does not rest upon presumed grant from long acquiescence on the part of the proprietors above and below. For it is impossible that such proprietors could prevent its acquisition.[4]

Illustrations.

A riparian owner may, accordingly, use the stream for the purpose of working machinery connected with his mines, or

[1] See Nuttall *v.* Bracewell, L. R. 2 Exch. 14. As to artificial watercourses, see *post*, p. 497 *et seq.*

[2] See Wood *v.* Waud, 3 Exch. 779, *per* Pollock, C. B.

[3] Miner *v.* Gilmour, 12 Moo. P. C. 156, *per* Lord Kingsdown. See also Acton *v.* Blundell, 12 M. & W. 349, 350; Wood *v.* Waud, 3 Exch. 748; Chasemore *v.* Richards, 2 H. & N. 181, 7 H. L. Cas. 349, 374, 379, 382; Ennor *v.* Barwell, 2 Giff. 424 *et seq.*; Gaved *v.* Martyn, 19 C. B., N. S. 732, 759; John Young & Co. *v.* Bankier Distillery Co., 1893, A. C. 691.

[4] See Chasemore *v.* Richards, 7 H. L. Cas. 368, 370, 382, 384—386; overruling the dicta to the contrary in Acton *v.* Blundell, *sup.* 324, 350; and Smith *v.* Kenrick, 7 C. B. 546.

as a means of transport for his minerals, or otherwise use the stream in a reasonable degree; or abstract or divert it in reasonable quantities.[1] But he may not, *primâ facie*, in undermining, tap the bed of the stream and draw off all the water;[2] or by any other act sensibly interfere with the common enjoyment.[3] It has been already seen, however, that where the quantity of water passing through a man's land is diminished by the withdrawal of support of subterranean water, and by that alone, he is without a remedy.[4]

Remedies for interference —damages.

If a man's natural right to use or abstract water flowing in a defined course is infringed, he may recover damages.[5]

Injunction.

He is also in general entitled to an injunction to restrain the continuance of the injury.[6] And his right to an injunction is independent of whether he can prove actual damage. His right, in this respect, was always recognised in cases, where the wrongdoer claimed the right to use the water in the manner complained of.[7] And it seems formerly to have been confined to such cases. Now, however, in other cases, where only nominal damages are recoverable, the right is nevertheless recognised; on the ground, that the injured party might otherwise be obliged to bring repeated and successive actions for damages.[8] A defendant, whose mining operations had caused the level of the bed of a stream to sink to the extent of four feet, was obliged to undertake not to work, so as to obstruct the supply of water along the stream; although no actual diminution of water was proved.[9]

Inspection

A litigant, who has a *primâ facie* case, may usually obtain, on interlocutory application, an order giving himself and his agents liberty to inspect his neighbour's property, for the purpose of ascertaining whether his water rights have been

[1] See Weeks *v.* Haward, 10 W. R. 557; John Young & Co. *v.* Bankier Distillery Co., *sup.*

[2] See Crompton *v.* Lea, 19 Eq. 127, 128. And see the observations on Grand Junction Co. *v.* Shugar, 6 Ch. 483, in Jordeson *v.* Sutton, 1899, 2 Ch. at 251, and English *v.* Met. Water Bd., 1907, 1 K. B. at 601—602.

[3] See Ennor *v.* Barwell, *sup.* 424 *et seq.* As to what will constitute a sensible interference, see Wood *v.* Waud, *sup.*

[4] See *ante*, pp. 441, 442.

[5] Bastard *v.* Smith, 2 M. & Rob. 129.

[6] Ennor *v.* Barwell, *sup.* 410.

[7] Elwell *v.* Crowther, 31 Beav. 163.

[8] See Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 773, 774, *per* Fry, J.

[9] Elwell *v.* Crowther, *sup.* For the form of an injunction against diverting or diminishing a flow of water, see Ennor *v.* Barwell, 2 Giff. 427, 428, Set. 592.

infringed ; [1] and, as ancillary to such liberty, liberty to make sections, plans, or models, and even to break up his neighbour's soil.[2] He will usually, however, have to submit to terms. He will usually be obliged to give a reasonable notice ; stating the time at which he proposes that the inspection shall take place, and the names of the persons whom he proposes as his agents for that purpose. And he will usually have to make good all damage which his neighbour may sustain.[3]

Indictment.

The owner of works carried on for profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, although done by them without his knowledge, and contrary to his general orders. This principle has been applied against the owner of a quarry whose workmen threw the rubbish from the quarry into a river, whereby the navigation was obstructed.[4]

Rights of non-riparian owner.

If a mine owner is not a riparian owner, he cannot obtain from a riparian owner an effectual grant of the use of the water for mining purposes. If, for example, a riparian owner demises the mines under his land, and the demise contains a grant to the lessee of liberty to " use and enjoy " the water " for colliery purposes," the liberty is not good as against other riparian owners.[5]

(γ) *Surface Water—Acquired Rights.*

Larger rights may be acquired by grant.

A man may by grant, express or implied, acquire, to the prejudice of the natural rights of his neighbours, the right to use, or to abstract or divert, natural surface water flowing in a defined course.[6]

Statutory grants.

Similar rights may be acquired by statute. Thus the course of streams may be altered for mining purposes under the Incl. Act, 22 & 23 Vict. c. 43.[7] So, the Duke of Cornwall, and persons acting under his authority, may take, use, and

[1] See Ennor *v.* Barwell, 1 De G. F. & J. 529 : cf. as to trespass, *post*, pp. 544, 545 ; as to support, *ante*, p. 449.

[2] See Ennor *v.* Barwell, 1 De G. F. & J. 530 ; in connection with Lumb *v.* Beaumont, 27 Ch. D. 356.

[3] See Ennor *v.* Barwell, 1 De G. F. & J. 529—532 ; varying on appeal an order of Vice-Chancellor Stuart. For forms of orders to inspect, see *post*, p. 546, n. [1].

[4] R. *v.* Stephens, L. R. 1 Q. B. 702.

[5] See Insole *v.* James, 1 H. & N. 243.

[6] See Weeks *v.* Haward, 10 W. R. 557 ; Gaved *v.* Martyn, 19 C. B., N. S. 759.

[7] See *ante*, pp. 459, 460.

divert water for mining purposes under the Act 7 & 8 Vict. c. 105.[1] So streams may be diverted and used for mining purposes under the Irish Act, 46 Geo. 3, c. 71.[2] And streams may be employed for mining purposes under the Irish Act, 23 & 24 Vict. c. 154.[3]

Or by prescription.

A right, to the prejudice of the natural rights of one's neighbours, to use, or abstract or divert, natural surface water flowing in a defined course may also be acquired by prescription. And such acquisition may be had either at common law,[4] or under the Prescription Act.[5] If a higher riparian owner acquires as an easement a right to pen back water, a right to the flow of a part of the water so penned back may be acquired against him by a lower riparian owner as an easement by prescription.[6] In order to enable water rights to be acquired under the Act, the person claiming them must show enjoyment as of right for the full period of twenty years. And if an interruption in the enjoyment be acquiesced in for more than a year before any proceedings are taken, a claim under the Act cannot be maintained.[7]

Or by custom.

And a similar right may sometimes be acquired by custom. Thus, according to the custom of Cornwall, all tin bounders are entitled to divert water within their bounds for the purposes of their mines.[8] However, the stanners of Devon are not entitled by custom to divert water from streams into their mines, and for that purpose to dig trenches over other persons' lands.[9]

Remedies for interference.

If a man's acquired rights in water flowing naturally and in a defined course are infringed, he may recover damages and have an injunction.[10]

[1] See *ante*, pp. 460, 461.

[2] *Ante*, p. 463.

[3] *Ante*, p. 464.

[4] Bealey *v.* Shaw, 6 East, 214, 215; Chasemore *v.* Richards, 2 H. & N. 182.

[5] Gaved *v.* Martyn, 19 C. B., N. S. 759; Pennington *v.* Brinsop Hall Co., 5 Ch. D. 769. See s. 2 of the Act cited *ante*, p. 322, n. [3].

[6] See Ennor *v.* Barwell, 2 Giff. 410, 419—421.

[7] *Ib.*

[8] See Rogers *v.* Brenton, 10 Q. B. 65; Gaved *v.* Martyn, *sup.* 732. See p. 488 of 3rd edition of this book.

[9] Bastard *v.* Smith, 2 M. & Rob. 129.

[10] See Pennington *v.* Brinsop Hall Co., 5 Ch. D. 774.

b.—WATER FLOWING NATURALLY—UNDEFINED COURSE—PERCOLATIONS.

(*a*) *Undefined Course.*

Primâ facie right to abstract or divert water in undefined course.

Very different considerations apply, where the water "comes no one knows exactly whence, and flows no one knows exactly how; which is unconfined in any channel, either as rainfall or from springs of the earth; which may vary from day to day." [1] If water flows in its natural course, but does not flow in a defined channel, any person through whose property it flows may, *primâ facie*, abstract or divert it at pleasure.[2] A man may, however, acquire by way of easement the right to prevent his neighbour from abstracting or diverting water which does not flow in a defined course.[3] And, if his acquired right is infringed, he may recover damages.[4]

(β) *Percolations—Effect of Brine-pumping.*

A fortiori percolating water—Chasemore *v.* Richards.

The principles applicable to water, the presence of which is due to natural causes; but which does not in fact flow, but merely percolates through the soil; follow *à fortiori* from those applicable to water, which, although flowing naturally, does not flow in a defined course.[5]

Acton *v.* Blundell.

And not merely is a man free from liability, who drains away percolating water, which would otherwise have found its way into his neighbour's property. He is equally free from liability, if, as the result of his operations, percolating water ceases to be retained in his neighbour's property. Thus, in *Acton* v. *Blundell*,[6] it was held, that the owner of land, through which water flows in a subterraneous course, has no right or interest in it, which will enable him to maintain an action against his neighbour, who, in carrying on mining operations

[1] See Grand Junction Canal Co. *v.* Shugar, 6 Ch. 487, *per* Lord Hatherley.

[2] Acton *v.* Blundell, 12 M. & W. 350; Chasemore *v.* Richards, 7 H. L. C. 349, 370, 371, 378. See also Ennor *v.* Barwell, 2 Giff. 410, 422.

[3] See Whitehead *v.* Parks, 2 H. & N. 870.

[4] *Ib.*

[5] Chasemore *v.* Richards, 7 H. L. C. 349; affirming S. C. 2 H. & N. 168. See also Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34; Bradford *v.* Pickles, 1895, A. C. 587; affirming S. C. 1895, 1 Ch. 145; and cf. New River Co. *v.* Johnson, 2 E. & E. 435.

[6] 12 M. & W. 324.

in his own land in the usual manner, drains away the water from the land of the former, and lays his well dry. If the law were otherwise, the advantage on one side and the detriment on the other would bear no proportion. And there would be no limit of space within which the claim of right could be confined.[1]

Ballacorkish, &c., Co. *v.* Harrison.

So also in *Ballacorkish, &c., Co.* v. *Harrison.*[2] There the holders of a mining lease caused water, which would otherwise have flowed into, or been retained in, wells and springs in the superjacent land, to be withdrawn by percolation into their mine. The property was situate in the Isle of Man; and the lessees held under the Crown, in whom the freehold in the mines was vested. The owners of the superjacent lands became such under a statutory severance of the titles; and they had used the wells and springs for farm purposes. It was held that they were not entitled to any remedy against the lessees of the mines. It was observed, that the relative positions of the surface owners and the mine owners could not be different from those of two horizontally adjacent owners who were always strangers in title;[3] and that one of two horizontally adjacent owners would not have been liable for laying his neighbour's well dry.[4]

Brine-pumping.

This principle probably entitles a landowner to pump from his neighbour's land water which is charged with brine, if he does so for the purpose only of obtaining the water. But it does not necessarily entitle him to do so for the purpose of obtaining the brine. The position may depend upon the facts.

[1] See p. 390. See also New River Co. *v.* Johnson, 2 E. & E. 435; West Cumberland, &c., Co. *v.* Kenyon, 6 Ch. D. 780, 781; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174, 175; Ballard *v.* Tomlinson, 29 Ch. D. 115; Jordeson *v.* Sutton, &c., Co., 1899, 2 Ch. 217. It is immaterial whether the well is ancient or not. It was queried in Acton *v.* Blundell (12 M. & W. 324), whether, if a well had been ancient, its owner would, under the circumstances stated in the text, have had a remedy. This question was, however, in effect answered in the negative in Chasemore *v.* Richards, 7 H. L. C. 349.

[2] L. R. 5 P. C. 49; nom. Ballacorkish, &c., Co. *v.* Dumbell, 43 L. J. P. C. 19.

[3] On the principle, that, where mines are excepted in an instrument of severance, the dominion of the mine owner in respect of the chamber which incloses the minerals is complete: *ante*, pp. 101, 102.

[4] See Acton *v.* Blundell, *sup.* It was also contended that, according to the custom of the Isle of Man (as to which see pp. 576, 577 of the 3rd edition of this book), compensation was payable for the damage done by the percolation; but no such custom was proved to exist.

If the natural conditions are unaltered, it may be that the neighbour would have a remedy.[1] If the natural conditions are altered, and artificial conditions are introduced, he may be without a remedy.

Salt Union, &c., *v.* Brunner, Mond, &c.

In *Salt Union, &c.* v. *Brunner, Mond, &c.*,[2] the plaintiffs and defendants were adjoining landowners; and the defendants by their pumping raised brine which was formed by the dissolution of rock salt in land belonging to the plaintiffs. Long prior to the time when they acquired their respective properties the natural conditions had been wholly changed. Underground mining; pumping for brine; the artificial formation of underground connections, which it was impossible to close; and inundations following these acts; had combined to produce conditions which were wholly new, and were also constantly shifting. The result was that no one could state the real source of the brine in question. It was held that the plaintiffs were without a remedy.[3]

Malice immaterial.

If a man is free from liability on other grounds, he does not become liable, merely because his motive is improper, or even malicious.[4]

Primâ facie rights may be affected by grant.

A man may acquire by way of grant the right to prevent his neighbour from abstracting or diverting water which percolates or oozes through the soil. Thus in *Whitehead* v. *Parks* [5] there was a demise of a dwelling-house and fifteen pieces of land, and a grant of all streams of water which lay under four of such pieces, naming them. There was an exception out of the demise of all mines, &c., and of all streams of water except those expressly granted; with power for the lessor to enter and work. There was only one stream of water upon the surface of the demised premises, and this was surrounded by the above-mentioned four pieces of land; but there were certain wells in those pieces of land. The lessor in working his mines cut off the wells. It was held, that the

[1] See Salt Union, &c. *v.* Brunner, Mond, &c., 1906, 2 K. B. 822, 831, 832. See also English *v.* Met. Water Bd., 1907, 1 K. B. at 602.

[2] 1906, 2 K. B. 822.

[3] See further, as to this case, *ante*, p. 443.

[4] See Bradford *v.* Pickles, 1895, A. C. 587, affirming S. C. 1895, 1 Ch. 145. This case must be taken to overrule the dicta to the contrary in Acton *v.* Blundell, 12 M. & W. 336; Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34; and Chasemore *v.* Richards, 7 H. L. C. 388.

[5] 2 H. & N. 870.

wells had passed by the grant; and that the lessor was, accordingly, liable.[1]

If a man's rights in percolating water are infringed, he may of course recover damages.[2] Damages for interference.

Whether a right founded on custom to obtain compensation for the damage caused by the diversion of percolating water can be sustained, is, it seems, doubtful.[3] Custom.

c.—WATER FLOWING IN ARTIFICIAL CHANNEL.

(α) *Natural Rights.*

Where the presence of water is due to artificial causes, any person, in or through whose property it flows, may, *primâ facie*, abstract or divert it at pleasure, without incurring any liability.[4] But, of course, no such right can be exercised, *primâ facie*, by a stranger.[5] Whether an action against a stranger for usurping such a right would lie at the suit of a person, who, under a mere permission from the owner of an artificial watercourse, conducts water therefrom to his land, is a question, which has been mooted, but not decided.[6] *Primâ facie* right to abstract or divert water flowing in artificial channel.

(β) *Acquired Rights.*

Rights to the prejudice of the natural rights of other persons may be acquired by express grant in water, the presence of which is due to artificial causes.[7] But, if the grant is made subject to specified conditions, the conditions must be strictly complied with.[8] *Primâ facie* rights may be affected by grant.

And it is clear, that, in many cases, rights may be acquired by prescription in respect of an artificial watercourse similar to those which riparian owners enjoy *ex jure naturæ* in respect of a natural watercourse.[9] Or by prescription.

[1] Cf. Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 60, 62.

[2] See Whitehead *v.* Parks, 2 H. & N. 870.

[3] See Ballacorkish Co. *v.* Harrison, L. R. 5 P. C. 64, 65; see p. 577 of the 3rd edition of this book.

[4] See Arkwright *v.* Gell, 5 M. & W. 203; Wood *v.* Waud, 3 Exch. 748; Gaved *v.* Martyn, 19 C. B., N. S. 759; Nuttall *v.* Bracewell, L. R. 2 Exch. 14.

[5] See Magor *v.* Chadwick, 11 A. & E. 571, 586; Wood *v.* Waud, *sup.*; Whaley *v.* Laing, 2 H. & N. 476; nom. Laing *v.* Whaley, 3 *ib.* 675.

[6] See Whaley *v.* Laing, *sup.* 486.

[7] See Gaved *v.* Martyn, 19 C. B., N. S. 759. Cf. Birmingham Canal Co. *v.* Lloyd, 18 Ves. 515.

[8] See Finch *v.* Birmingham Canal Nav., 5 B. & C. 820, a case dealing with statutory rights in water raised from mines.

[9] It was formerly supposed that no such rights could be acquired, however

Ivimey *v.* Stocker.

Thus in *Ivimey* v. *Stocker* [1] a mine had from before the time of living memory been worked by tin bounders according to the custom of Cornwall.[2] The bounders had from before the time of living memory used for the purposes of their works the water of an artificial watercourse, which arose in the land of another person. The bounders abandoned the mine nine years before the action was commenced, and since that time the owners had been in possession. It was held, that the owners had acquired by prescription a right to the use of the water; and that the owner of the land in which the water rose was not, therefore, entitled to divert it.[3]

Gaved *v.* Martyn—*jus tertii*—occupier.

And the mere contingent rights of third parties to divert water are not of themselves sufficient to prevent a person from acquiring by prescription a right to the use of an artificial watercourse. Thus in *Gaved* v. *Martyn*,[4] a flow of water [5] was procured by the plaintiff's predecessor in title driving an adit into land which was subject to the rights of tin bounders.[6] The flow was intended to be permanent; and it was enjoyed by the plaintiff and his predecessors without interruption for more than twenty years. The defendant diverted the water. It was held, that the existence of rights in the bounders, which they had not chosen to exercise, did not deprive the plaintiff of the remedy which he would otherwise have had.[7] And it is not necessary that the person claiming the right should be a freeholder. A mere occupier of land, through which water flows in an artificial course, such as a lessee or licensee, has a sufficient interest in the soil to entitle him, after an enjoyment for twenty years, to maintain an action

ancient the watercourse might be, and in whatever degree, and by however numerous a class of persons, enjoyed: see Magor *v.* Chadwick, 11 A. & E. 568.

[1] 1 Ch. 396.

[2] See pp. 482 *et seq.* of the 3rd edition of this book.

[3] Reversing S. C. 2 Dr. & Sm. 537; where it was held, that the interests of the bounders were an impediment in the way of and adverse to the rights of the owners; and that they could not, therefore, be regarded as the predecessors in estate of the owners. See further, as to this case, pp. 488, 489 of the 3rd edition.

[4] 19 C. B., N. S. 732.

[5] The "lower launder" referred to in the case. As to the "upper launder," see *post*, p. 501.

[6] See pp. 482 *et seq.* of the 3rd edition.

[7] See also Arkwright *v.* Gell, 5 M. & W. 203; Magor *v.* Chadwick, 11 A. & E. 571; Wood *v.* Waud, 3 Exch. 748; Whaley *v.* Laing, 2 H. & N. 476; nom. Laing *v.* Whaley, 3 *ib.* 675. Cf. Falmouth *v.* Innys, Mosely, 92.

for diversion.[1] And, of course, his right is none the less, because he also happens to have the right of searching for minerals in land not in his occupation.[2]

But there must be an enjoyment as of right.

The easement must, however, if claimed by prescription, be, as in all other cases, enjoyed as of right, and neither *vi, clam,* nor *precario*. If, therefore, a flow of water has its origin in a man discharging it from his property for his own convenience; and it thence flows, either in an artificial channel, or in a channel of its own formation; the enjoyment of it will be considered to be precarious; and no rights in respect of it can be acquired as against him by prescription either at common law or under the Prescription Act.

Arkwright *v.* Gell.

Thus in *Arkwright* v. *Gell*,[3] a company of proprietors in the early part of the eighteenth century, and by an agreement with the mine owners,[4] constructed a sough or drain for the purpose of draining certain mineral fields. The water from this sough flowed into a brook. In 1771 the plaintiff's predecessor in title became the lessee of the brook, of the stream issuing from the sough, and of a piece of land below the junction of the sough with the brook. He shortly afterwards erected cotton mills on this piece of land; and these cotton mills were turned by the united waters of the sough and the brook. In 1789 he became the owner in fee of those properties, and also of the land through which the sough was made. Meanwhile, in 1771 another company of proprietors, whom the defendants represented, by another agreement with the mine owners, commenced the erection of another sough, in order to drain a larger portion of the mineral fields. This sough was on a lower level than the former one. In 1836 the latter sough became so far extended as to drain the water from the former one; and the water supplying the plaintiff's mills was in consequence diverted. It was held, that no action could have been maintained against the mine owners; and that, accordingly, no action was maintainable against persons who merely stood in the position of their agents. It was observed, that the mill owner should be taken to have known, that the

[1] See Gaved *v.* Martyn, 19 C. B., N. S. 732, 752.

[2] *Ib., per* Willes, J.

[3] 5 M. & W. 203.

[4] Such agreements have long been customary in Derbyshire, where the mines in question were situate, and in fact form part of the Derbyshire Custom: see p. 576, n. [2], of the 3rd edition of this book.

watercourse had been made for the particular and temporary purpose of getting rid of a nuisance to the mines, and that it might at any time have been discontinued by the mine owners. There could not have been any presumption of a grant at common law of the right to the watercourse. For such a grant would have obliged the mine owners not to work their minerals by the ordinary mode of getting them below the level drained by the sough; and to keep the mines flooded up to that level, in order to make the flow constant for the benefit of the mill owner. And the right was one which could not have been acquired under the Prescription Act. For that Act only applies to easements, which are enjoyed as of right, and are susceptible of interruption by the servient owner.[1]

Wood *v.* Waud.

The principle of *Arkwright* v. *Gell* is not, however, confined to cases, where the owner in whose property the flow of water originates is the person who diverts the water. The same principle applies so as, *primâ facie,* to exempt from liability intermediate owners who divert water the presence of which is due to accidental circumstances. Thus, in *Wood* v. *Waud,*[2] the owners of a colliery had suffered water to flow out of their colliery in an artificial watercourse into an immemorial and natural stream for more than sixty years. The plaintiff was a mill owner, whose mills were situated on the banks of the stream. An intermediate owner, through whose lands the artificial watercourse passed, diverted it. It was held, that no action was maintainable. The Court, after recognising the authority of *Arkwright* v. *Gell,*[3] observed: "These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed. Each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land." [4]

[1] See also Magor *v.* Chadwick, 11 A. & E. 571, 585; Wood *v.* Waud, 3 Exch. 748; N. E. R. Co. *v.* Elliot, 1 J. & H. 154; Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34; Gaved *v.* Martyn, 19 C. B., N. S. 732; see s. 2 of the Act cited *ante,* p. 322, n. [3].

[2] 3 Exch. 748.

[3] 5 M. & W. 203; *ante,* p. 499.

[4] See 3 Exch. 779.

So in *Gaved* v. *Martyn*.[1] There a tin-tye or artificial cut had been made by tin bounders; and water had been brought by them to the surface, and carried along such cut, for the purpose of streaming for tin. The stream flowed over the defendant's land, and ran into a brook. The plaintiff had conducted this stream by means of a trough or launder [2] across the brook to certain clay works which he occupied; and he had enjoyed the stream without interruption for more than twenty years. It was held, that the tin bounders could not be considered as having permanently abandoned their right of control over the water; and that the plaintiff had not accordingly any right of action against the defendant for diverting the stream.[3] In fact, the enjoyment of the easement [4] of discharging water upon the property of a neighbour is of itself no evidence of the existence of an easement in favour of that neighbour of being bound to continue the discharge.[5] Gaved *v.* Martyn.

Chamber Colliery Co. v. *Hopwood* [6] was decided on similar grounds. There the defendants' predecessors in 1834 demised to the plaintiffs' predecessors the coal under the Chamber Hall estate for fifty years, with powers to sink pits, make soughs, &c., erect engines, and make drains, &c., for supplying such engines with water, and also to do certain other works on the surface for the better draining and working the demised mines, and any other mines of which the plaintiffs might become lessees under the lands of any other person. In 1836 the plaintiffs took a lease of the Oak Colliery from a neighbouring owner. In 1846 the plaintiffs made a drain from a point on the Chamber Hall estate, and thereby diverted a natural stream on that estate and brought it down to the Oak Colliery, and made reservoirs there to store it. They did not ask leave to make the drain, but the agent of the Chamber Hall estate Chamber Colliery Co. *v.* Hopwood.

[1] 19 C. B., N. S. 732.

[2] Called in the case the "upper launder." See, as to the "lower launder," *ante*, p. 498. The lower launder had not been made by the bounders, but was only subject to their rights. See, as to tin bounding and streaming, pp. 482 *et seq.*, 488, of the 3rd edition of this book.

[3] See also Wardle *v.* Brocklehurst, 1 E. & E. 1060, 1061; Chamber Colliery Co. *v.* Hopwood, 32 Ch. D. 558: cf. Ivimey *v.* Stocker, 1 Ch. 409.

[4] See *post*, pp. 508, 509.

[5] See Gaved *v.* Martyn, 19 C. B. N. S. 758.

[6] 32 Ch. D. 549.

saw the work going on, and encouraged it. In 1872 the plaintiffs became owners in fee of the Oak Colliery. In 1884, when the lease from the defendants expired, the defendants stopped the drain and diverted the water. It was held, either (1) that the making of the drain was authorised by the lease, or (2) that both parties so supposed at the time, or (3) that it was made under the comity which usually exists between landlords and their tenants; and that on none of these theories could there have been an enjoyment as of right.

Construction of watercourse under mere licence.

Where an artificial watercourse was constructed over the land of the servient owner under a mere licence granted by him to the dominant owner; and a successor in title of the dominant owner enjoyed it without interruption for twenty years; and he had no knowledge of the licence; the fact of the licence is not of itself sufficient to stamp the character of precariousness on the enjoyment. But it is evidence from which a jury may find that there was never any enjoyment as of right.[1]

Remedies—damages.

If a man's rights in an artificial watercourse are infringed, he may recover damages.[2]

Injunction.

The injured party may also have an injunction.[3] But his right to an injunction may be lost by laches, especially if he has permitted expenditure by the other party.[4] And, if the enforcement of the right would cause inconvenience or injury to the working of a mine, it will not, except in clear cases, be enforced; at all events on interlocutory motion.[5]

Sect. 2.—WATER—FOULING.

a.—WATER FLOWING NATURALLY—DEFINED COURSE.

Riparian owner may not, *primâ facie*, foul natural surface water.

On the same principle, that a riparian owner may use a stream in a reasonable degree, or abstract or divert it in reasonable quantities,[6] he may, by washing his minerals by means

[1] Gaved *v.* Martyn, 19 C. B., N. S. 732: see p. 745, *per* Willes, J. For a claim to use canal water for mining purposes, based on expectation followed by expenditure, see Bankart *v.* Tennant, 10 Eq. 141; and *ante*, p. 473, n [4].

[2] Gaved *v.* Martyn, 19 C. B., N. S. 732; Ivimey *v.* Stocker, 1 Ch. 408.

[3] Ivimey *v.* Stocker, *sup.*

[4] See Birmingham *v.* Lloyd, 18 Ves. 515.

[5] See *ib.*; cf. other cases cited *ante*, p. 98, n. [5].

[6] See *ante*, p. 491.

of it, or pumping water from his mines into it, alter its quality in a reasonable degree. But, as he may not sensibly diminish the body of the stream,[1] he may not sensibly alter its quality. If, therefore, in its natural state, it is soft and suitable for distillation, he must not, *primâ facie*, harden it and so make it less suitable for distillation.[2] *A fortiori*, he must not, *primâ facie*, impregnate it with poisonous or foul matter.[3]

But may under grant or prescription.

He may, however, acquire by grant or prescription the right to foul the stream.[4] And a right acquired by prescription may be acquired either at common law,[5] or under the Prescription Act.[6] In *Carlyon* v. *Lovering* [7] the plaintiff and the defendant were riparian owners of a watercourse flowing upon the surface. The defendant's property was situated higher up the stream than the plaintiff's, and consisted of tin mines. The defendant, in washing his minerals, sent a quantity of sand, stones, and rubbish, which became dislodged in the process, down the stream; and the stream was in consequence fouled. In an action for so doing a plea of a right under the Prescription Act [6] was held a good plea. In *Wright* v. *Williams* [8] an action was brought for fouling a watercourse on the plaintiff's land. The defendant, who was the owner of a copper mine, pleaded a right to sink pits on his own land; to fill such pits with iron; to cover the same with water pumped from the mine for the purpose of precipitating the copper contained in such water; and then a right under the Prescription Act [6] to let off the water impregnated with metallic substances into the watercourse. The plea was held good; on the ground that the right in question was in substance a claim to a watercourse over the land of another person.[9]

[1] *Ante*, p. 491.

[2] John Young & Co. *v.* Bankier Distillery Co., 1893, A. C. 691.

[3] See Hodgkinson *v.* Ennor, 4 B. & S. 229; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 769. See also Wood *v.* Waud, 3 Exch. 748. It is no defence to an action for fouling a stream to show, that it is also fouled by other persons: Wood *v.* Waud, *sup.*; Pennington *v.* Brinsop Hall Coal Co., *sup.* 772. The law of Pennsylvania is different: Pennsylvania Coal Co. *v.* Sanderson, 56 Amer. Rep. 89, n. As to fouling from natural drainage, *qu.* The point was left open in the Sc. case of White *v.* Dixon, 2 R. 904.

[4] See Wood *v.* Waud, *sup.* 772; Carlyon *v.* Lovering, 1 H. & N. 797, 798.

[5] See Bealey *v.* Shaw, 6 East, 214, 215.

[6] See s. 2, cited *ante*, p. 322, n. [3].

[7] 1 H. & N. 784.

[8] 1 M. & W. 77.

[9] See also Wood *v.* Waud, 3 Exch. 748, 772.

Or under custom.

A claim by custom to foul natural surface water was held good in *Carlyon* v. *Lovering*.[1] In that case (the facts of which have been already partly stated [2]), one of the pleas was a plea of an immemorial custom for miners within the stannaries of Cornwall to do the act complained of.[3] The decision was founded on the fact, that the custom in question was not indefinite or unreasonable, but limited to the necessary working of the mines.

Remedies for wrongfully fouling natural surface water.

If a man's natural [4] rights in water flowing in its natural course and in a defined channel are infringed by fouling it, he may, in general, recover damages.[5] The measure of damages will of course be the expenses to which he has been put.[6] He is also, in general, entitled to an injunction to restrain the continuance of the injury. And his right to an injunction is independent of whether he can prove actual damage.[7] If a man's acquired [8] rights in water flowing in its natural course and in a defined channel are infringed by fouling it, he may, in general, recover damages, and have an injunction.[9]

b.—WATER FLOWING NATURALLY—UNDEFINED COURSE—PERCOLATIONS.

No right, *primâ facie*, to foul water in undefined channel, or percolating water.

It does not follow, that, because water, which does not flow in a defined channel,[10] or which percolates,[11] may, *primâ facie*, be abstracted or diverted, it may be fouled. Whoever fouls water, which does not flow in a defined channel,[12] or which percolates,[13] may, *primâ facie*, be made liable in damages ; and may be restrained by injunction.[14]

c.—WATER FLOWING IN ARTIFICIAL CHANNEL.

Or water in artificial channel—Magor *v.* Chadwick.

In *Magor* v. *Chadwick* [15] the owners of a mine made an adit through their lands in order to drain the mine. They

[1] 1 H. & N. 784.
[2] See preceding page.
[3] See p. 489 of the 3rd edition of this book.
[4] See *ante*, p. 490.
[5] Wood *v.* Waud, *sup.* 748 ; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 774.
[6] Pennington *v.* Brinsop Hall Coal Co., *sup.* 769, 774.
[7] *Ib.* ; and see *ante*, p. 491.
[8] See *ante*, p. 492.
[9] See Pennington *v.* Brinsop Hall Coal Co., *sup.*
[10] *Ante*, p. 494.
[11] *Ante*, pp. 494—497.
[12] Hodgkinson *v.* Ennor, 4 B. & S. 229.
[13] *Ib.* ; Ballard *v.* Tomlinson, 29 Ch. D. 115, reversing S. C. 26 *ib.* 194.
[14] Turner *v.* Mirfield, 34 Beav. 390 ; Ballard *v.* Tomlinson, *sup.*
[15] 11 A. & E. 571.

afterwards ceased to work the mine; and the plaintiffs, who were the owners of a brewery, and through whose premises the water had flowed for more than twenty years after the working ceased, had used it during that time for brewing. The defendants, who were the owners of other mines, and did not claim under the owners of the adit, began to use the adit for the purpose of draining their mines; and, in so doing, they polluted the water. They were held liable.

Whaley *v.* Laing.

In *Whaley* v. *Laing*[1] the plaintiff, by the permission of a canal company, made a communication from the canal to his own premises. By means of the water so conducted he fed the boilers of an engine, which he used for mining purposes. The defendant, without any right or permission from the company, fouled the water in the canal, and, in consequence, the water which came to the plaintiff's premises; and by contact with this water the plaintiff's boilers were injured. It was contended, that the plaintiff had no right to the water until he took it; that, when he took it, it was already fouled; that it was, therefore, his own act which occasioned the injury; and that he could not, accordingly, have any right of action. The defendant was, however, held liable.[2]

Other cases of fouling.

In *Magor* v. *Chadwick* the defendants were strangers, and the plaintiffs had an uninterrupted enjoyment of the water for more than twenty years; and the decision proceeded expressly upon those two grounds.[3] It seems, however, clear, that a person in whose land an artificial watercourse commences to flow is, *primâ facie*, under an equal disability with a stranger to foul that water, to the prejudice of the person whose land it reaches. And it seems equally clear, that such disability ought not to depend on an uninterrupted enjoyment by the injured party for twenty years; but that it ought to exist, however short the enjoyment may be.[4] Whether, in each of

[1] 2 H. & N. 476.

[2] This decision was in the Exch. Ch. (nom. Laing *v.* Whaley, 3 H. & N. 675, 901), reversed by a majority of the Court, but only upon a question of pleading.

[3] See 11 A. & E. p. 586; and see the observations on this case in Wood *v.* Waud, 3 Exch. 777.

[4] See and consider Wood *v.* Waud, *sup.* 777, 779; Whaley *v.* Laing, 2 H. & N. 486; and cf. Hodgkinson *v.* Ennor, 4 B. & S. 229; Turner *v.* Mirfield, 34 Beav. 390. Such a fouling is an excessive user of the acquired easement to discharge the water (as to which, see *post*, pp. 508, 509). The point was expressly left open in Magor *v.* Chadwick: see 11 A. & E. 586.

these cases, the disability extends to an intermediate owner through whose land the water flows without any act on his part to induce such flow, is a question of greater difficulty. But it is conceived, that this may also be answered in the affirmative.

Damages. If a man's rights in an artificial watercourse are infringed by fouling it, he may of course recover damages.[1]

d.—RIVERS POLLUTION PREVENTION ACT.

Offences against the Act. Every person, who puts the solid refuse of any quarry into a stream,[2] so as to interfere with its due flow, or to pollute its waters, commits an offence against the Riv. Poll. Prev. Act, 1876.[3] Every person, who puts any solid matter from any mine into any stream, in such quantities as to prejudicially interfere with its due flow; or any poisonous, noxious or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine; commits an offence against the Act; unless, in the case of poisonous, noxious or polluting matter, he shows to the satisfaction of the Court, that he is using the best means to render it harmless.[4]

Proceedings. Proceedings, however, cannot be taken against any person, who puts refuse from a mine into a stream, save by a sanitary authority, nor without the consent of the Local Government Board. But, if the sanitary authority refuse to take proceedings, the person interested may apply to the Local Government Board, who may direct the sanitary authority to take proceedings. Any person against whom any proceedings are proposed to be taken may object before the sanitary authority to such proceedings being taken.[5] The sanitary authority are empowered to enforce the provisions of the Act.[6] Offences against the Act may be restrained by the summary order of a county court; and disobedience to the order subjects the defaulter to penalties.[7] An appeal lies to the High Court, and

[1] Magor *v.* Chadwick, *sup.*; Whaley *v.* Laing, *sup.*

[2] As to the meaning of "stream," see 39 & 40 Vict. c. 75, s. 20.

[3] 39 & 40 Vict. c. 75: see s. 2.

[4] S. 5.

[5] S. 6.

[6] S. 8.

[7] S. 10.

a case may be removed there.[1] Proceedings cannot be taken, until the expiration of two months after written notice of the intention to take them has been given to the offender; nor while other proceedings in relation to such offence are pending.[2] However, the powers given by the Act do not prejudice any other powers vested in any person; and such other powers may be exercised, as if the Act had not passed.[3]

SECT. 3.—WATER—DISCHARGE AND ESCAPE.

a.—DISCHARGE OF WATER.

(*a*) *Natural Rights.*

No right, *primâ facie*, to make channel in neighbour's property.

It need hardly be said, that a man has no right, *primâ facie*, to make a channel through or in his neighbour's property for the purpose of receiving a discharge of water from his own property.[4]

No right, *primâ facie*, to discharge water.

Nor, although he makes no channel through or in his neighbour's property, has a man a right, *primâ facie*, to be an active instrument in discharging water from his own property upon the property of his neighbour.[5] Thus, in *Arkwright* v. *Gell*,[6] already referred to,[7] and the cases which followed that decision,[8] the person, in whose property the discharge originated, would have had no right, *primâ facie*, to compel his neighbour to receive the discharge. So a mine owner has no right, *primâ facie*, to be an active instrument in discharging water from his property into a stream in which his neighbour has riparian rights.[9]

Upper and lower mines.

In like manner, if an owner, whose mine is upon a higher level, conducts water therefrom to the mine of a lower owner

[1] S. 11.
[2] S. 13.
[3] S. 16.
[4] Powell *v.* Aiken, 4 K. & J. 343; Bowser *v.* Maclean, 2 De G. F. & J. 415, 421.
[5] See Gaved *v.* Martyn, 19 C. B., N. S. 758; Roberts *v.* Rose, 3 H. & C. 162, L. R. 1 Exch. 89, 90; Hurdman *v.* N. E. R. Co., 3 C. P. D. 173.
[6] 5 M. & W. 203.
[7] *Ante*, p. 499.
[8] Magor *v.* Chadwick, 11 A. & E. 571; Wood *v.* Waud, 3 Exch. 748; Gaved *v.* Martyn, *sup.* 732: see *ante*, pp. 500—502.
[9] John Young & Co. *v.* Bankier Distillery Co., 1893, A. C. 691. The law of Pennsylvania is different: see Pennsylvania Coal Co. *v.* Sanderson, 56 Amer. Rep. 89, n.

by artificial pipes,[1] or channels ; [2] or, in any other way, actively interferes in conveying water therefrom to a lower mine ; [3] he is, *primâ facie*, liable for the injury thereby caused. Moreover, if a barrier between an upper and a lower mine, which, if left undisturbed, would have prevented an influx of water, has been removed or perforated by the lower owner, the higher owner is not at liberty, *primâ facie*, to conduct water in such a course as to pass by the aperture or perforations into the lower mine. For no man has a right, *primâ facie*, to conduct water to the weak point of his neighbour's boundary.[4] And even, if an upper owner pumps up water from a lower to an upper part of his own mines, and such water thence descends by gravitation into the lower mine, and floods it, the upper owner is liable.[5] The occupiers of an upper mine have no right to "interfere with the gravitation" of the water.[6]

Absence of negligence immaterial.

And in none of such cases can the upper owner excuse himself on the ground, that he has acted without negligence, and in the due working of his mine, and in order to work it as advantageously as possible.[7]

(β) *Acquired Rights.*

Right may be acquired by grant or prescription.

A right may be acquired as an easement by grant ; or by prescription at common law, or under the Prescription Act ; to interfere actively in discharging water upon the land of another, whether such water does, or does not, originate in the land of the dominant owner.[8] A liberty to drain water

[1] Lomax *v.* Stott, 39 L. J. Ch. 834.

[2] Baird *v.* Williamson, 15 C. B., N. S. 390, 391 ; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478 ; Plant *v.* Stott, 21 L. T., N. S. 106 ; Phillips *v.* Homfray, 6 Ch. 781 ; John Young & Co. *v.* Bankier Distillery Co., *sup.* 697, 701.

[3] Haward *v.* Bankes, 2 Burr. 1114 ; Beaufort *v.* Morris, 6 Ha. 340 ; Smith *v.* Kenrick, 7 C. B. 563, 566 ; Fletcher *v.* Rylands, 3 H. & C. 789, 796 ; Smith *v.* Fletcher, L. R. 9 Exch. 65 ; Crompton *v.* Lea, 19 Eq. 127.

[4] Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478 : cf. Lomax *v.* Stott, 39 *ib.* 834. The law of Scotland is the same : see Durham *v.* Hood, 9 M. 474, where the upper owner had exploded large charges of gunpowder in order to get rid of the water.

[5] Baird *v.* Williamson, 15 C. B., N. S. 376 ; Rylands *v.* Fletcher, L. R. 3 H. L. 341 ; and see A.-G. *v.* Tomline, 12 Ch. D. 228, 229.

[6] Baird *v.* Williamson, *sup.* 392.

[7] See Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478 ; Rylands *v.* Fletcher, L. R. 3 H. L. 341, 342.

[8] See Arkwright *v.* Gell, 5 M. & W. 203 ; Magor *v.* Chadwick, 11 A. & E. 571 ; Wood *v.* Waud, 3 Exch. 748 ; Gaved *v.* Martyn, 19 C. B., N. S. 758 ; Roberts *v.* Rose, 3 H. & C. 162, L. R.

from an intended "colliery" will, having regard to the wide meaning of that word,[1] receive a proportionately wide construction.[2]

Rail. & Wat. Cl. Acts.

A landowner, whose land is compulsorily purchased by a railway company under the authority of the Rail. Cl. Cons. Act, 1845; who possesses mines under the railway, or within the prescribed distance, or, where no distance is prescribed, within forty yards therefrom, which he is prevented from working by reason of apprehended injury thereto; and who possesses other adjoining mines, which extend so as to lie upon both sides of the railway; has under the Act a right to make water communications between such other mines through the intervening land for drainage purposes.[3] And the Wat. Cl. Act [4] contains somewhat similar provisions.

Other statutory grants.

Mining easements in respect of water may also be exercised under the Incl. Act, 22 & 23 Vict. c. 43; [5] by the Duke of Cornwall and his lessees under the Act 7 & 8 Vict. c. 105; [6] by the Crown and persons claiming under it under the Cornwall Subm. Mines Act, 1858; [7] and by the Crown in respect of the foreshore or the adjacent lands under the Crown Lands Act, 1865.[8]

Negligence.

In whatever way a right is acquired in respect of water, it must not be exercised negligently.[9]

b.—ESCAPE OF WATER.

(*a*) *Natural Rights—Gravitation—Water present naturally.*

General *primâ facie* right to permit escape of water present naturally.

Primâ facie, a man is free from liability, if water, which is present in the ordinary course of nature upon or within or beside his property, escapes from or through his property to that of his neighbour by the mere force of gravitation.[10]

1 Exch. 82, 89, 90; Chamber Colliery Co. *v.* Hopwood, 32 Ch. D. 558: cf. Carlyon *v.* Lovering, 1 H. & N. 784.

[1] See *ante*, pp. 9, 10.

[2] See Hodgson *v.* Field, 7 East, 613, 620.

[3] See ss. 80, 82, of the Act, cited *ante*, pp. 372, 373.

[4] See s. 24 of the Act, cited *ante*, p. 376.

[5] *Ante*, pp. 459, 460.

[6] *Ante*, pp. 460, 461.

[7] *Ante*, pp. 462, 463.

[8] *Ante*, p. 463.

[9] See Smith *v.* Kenrick, 7 C. B. 515; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Crompton *v.* Lea, 19 Eq. 127, 129.

[10] See Smith *v.* Kenrick, *sup.* 515, 564; Fletcher *v.* Rylands, 3 H. & C. 789; Rylands *v.* Fletcher, L. R. 3 H. L. 338, 342; Jegon *v.* Vivian, 6 Ch.

If, in such a case, the neighbour wishes to protect himself, he should put up barriers.[1] "The water is a sort of common enemy, against which each man must defend himself." [2] And this is his only remedy. He cannot, for example, enter upon the property of the other owner, in order to remove the water.[3]

Natural user of property—damage—well-water.

So, if a man digs a well upon his land; and his neighbour, whose land is on a lower level, afterwards opens a mine, and the water flows into it; the owner of the well is free from liability.[4]

Upper and lower mines—natural workings—Smith *v.* Kenrick.

And if the workings, or an alteration in the workings, of a mine owner upon a higher level are proper and usual, he will be free from liability; although, as the necessary result of such workings, or such alteration, water, which had not previously so descended, descends by gravitation into a lower mine; or water, which had previously descended, descends in greater quantities.[5] Thus, in *Smith* v. *Kenrick*,[6] the plaintiff and the defendant were the owners of collieries A. and B. The collieries adjoined, and B. was on a higher level than A. A predecessor of the defendant, but with whom he had no privity, had made three "thyrlings" or large holes through a vertical seam of coal in A., which formed a barrier between A. and B. When the defendant became the occupier of B., there was a large body of subterranean water therein, which was supported by a thick horizontal bar of coal in B. The inevitable effect of removing the bar would be, that the water, by the mere force of gravitation, would flow through the thyrlings into A. The defendant nevertheless worked out the bar in the usual and proper course; and A. was in consequence inundated. It was held, that the plaintiff had no remedy.[7]

758, 759; Wilson *v.* Waddell, 2 A. C. 98, 99; A.-G. *v.* Tomline, 12 Ch. D. 228, 14 *ib.* 63; John Young & Co. *v.* Bankier Distillery Co., 1893, A. C. 697, 701.

[1] See Smith *v.* Kenrick, *sup.* 565; Baird *v.* Williamson, 15 C. B., N. S. 392; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 478; Rylands *v.* Fletcher, *sup.* 339, 341; Crompton *v.* Lea, *sup.* 123, 124. See also Jegon *v.* Vivian, *sup.*

[2] Smith *v.* Kenrick, *sup.* 566, *per* Cresswell, J.

[3] See R. *v.* Spon Lane Co., 3 Q. B. D. 680, 682, *per* Cockburn, C. J., and Mellor, J. The law of Scotland is the same: see Durham *v.* Hood, 9 M. 474.

[4] See the question asked by Bramwell, B., in Fletcher *v.* Rylands, 3 H. & C. 781; cf. the converse case of Acton *v.* Blundell, *ante*, p. 494.

[5] See Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34.

[6] 7 C. B. 515.

[7] See also Baird *v.* Williamson, 15 C. B., N. S. 376, 388, 390, 392; Rylands *v.* Fletcher, L. R. 3 H. L. 339,

If, while the occupier of a higher mine exercises his right to get all minerals therefrom, nature causes water to flow to a lower mine, he is not responsible for this operation of nature.[1] And the principle applicable to water collected by previous workings equally applies to water collected by the workings or alteration in question.[2]

Rainfalls—Wilson *v.* Waddell.

So in the case of surface water produced by rainfalls. Thus, in *Wilson* v. *Waddell*,[3] the respondents were the owners of mines, which dipped towards adjacent mines of the appellants in such a way that rain falling on the surface of the respondents' mines would, unless stopped by such surface or by the minerals thereunder, descend by gravitation into the appellants' mines. The respondents, in the usual and proper course of working, removed their minerals. The superjacent surface in consequence cracked ; and the rainfall, which would otherwise have flowed over it, flowed into the respondents' workings, and thence into the appellants' mines. It was held, that this was a *damnum absque injuriâ ;* and that the appellants were without a remedy. No servitude, in such cases, lies, *primâ facie,* on the owner of the upper mines, for the benefit of the owner of the mines on the dip, to preserve either the surface, or the subjacent minerals, as watertight as the undisturbed state of the strata.[4] And even where the upper mine is worked, not by mining, but by quarrying, the result is the same ; although, as the consequence, the rain, instead of escaping by the ordinary watercourses, becomes confined in a leaky or porous hollow.[5]

Damming up water in upper mine.

Lomax v. *Stott* [6] was decided on similar principles. There the defendants were working mines in two places, A. and B. ; B. being to the dip of A., towards which the water from A. would naturally flow in the proper course of working. The defendants worked out the minerals in A. ; and then, to save pumping up the water, they stopped up the opening between A. and B. The water in consequence became dammed up in

341 ; Crompton *v.* Lea, 19 Eq. 123, 124, 126 ; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174 ; West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 787—789 ; A.-G. *v.* Tomline, 12 *ib.* 228.

[1] Baird *v.* Williamson, *sup.* 391, 392.

[2] Crompton *v.* Lea, *sup.* 127.

[3] 2 A. C. 95.

[4] See Wilson *v.* Waddell, 2 A. C. 99.

[5] See Smith *v.* Fletcher, L. R. 7 Exch. 307, 309, 9 *ib.* 66 ; Fletcher *v.* Smith, 2 A. C. 786 ; and cf. Hurdman *v.* North-East. Rail. Co., 3 C. P. D. 168.

[6] 39 L. J. Ch. 834.

A.; and it then rose so high as to overflow by gravitation the plaintiff's mine. It was held, that the plaintiff had no remedy.[1]

Making drifts or ways in upper mine.

And if the higher owner makes a crut, or drift, in his mine, not for the purpose of artificially conducting water into his neighbour's mine, but in the ordinary and proper course of working his own mine; and water flows along such crut, or drift, and floods his neighbour's mine; the higher owner will not, *primâ facie*, be liable.[2]

User of way of necessity.

Upon similar principles, a man who is entitled to sink a shaft through overlying land from the surface to the mines in order to reach and work them,[3] is not apparently the less entitled, because it is shown, that the process of sinking will inevitably let loose a body of water within the overlying land, and thereby ruin it.[4] It is at all events certain, that he will not be restrained from so doing, if the anticipated danger is shown to be visionary.[5]

Trespass by higher owner —non-liability of successor.

Where, however, the higher owner enters the lower mine, and removes minerals therefrom which would otherwise have acted as a barrier, he cannot free himself from liability in respect of the water on the ground that the flow is due to gravitation.[6] But his liability in respect of the water is, it seems, consequential only upon his liability in respect of the original trespass. And, if so, it must be enforced at the same time; and it must be enforced once for all. It cannot be enforced in an independent action; and it cannot be treated as a case of continuing nuisance, and so enforced from time to time.[7] If these be sound conclusions, the higher owner can never be made liable in respect of the water where he was not himself the original trespasser. And, whether sound or unsound, his non-liability in such a case is, it is submitted, clear

[1] The barrier between the two mines had been pierced by the plaintiff's predecessors, who, in so doing, had trespassed in the defendants' mine.

[2] See Baird *v.* Williamson, 15 C. B., N. S. 376, 390, 391, where a crut had been made; Jegon *v.* Vivian, 6 Ch. 742, 758, where drifts had been made. See also Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Phillips *v.* Homfray, 6 Ch. 781; and see Smith *v.* Fletcher, L. R. 9 Ex. 64, 65, 67; nom. Fletcher *v.* Smith, 2 A. C. 781.

[3] See *ante*, pp. 483, 484.

[4] See Goold *v.* Gt. West. Coal Co., 2 De G. J. & S. 610 *et seq.*

[5] *Ib.*

[6] See Firmstone *v.* Wheeley, 2 D. & L. 203; Clegg *v.* Dearden, 12 Q. B. 576; Smith *v.* Kenrick, 7 C. B. 515.

[7] Clegg *v.* Dearden, *sup.*; Smith *v.* Kenrick, *sup.* 560, 561, see also *post*, p. 541. Firmstone *v.* Wheeley, *sup.*, if an actual decision to the contrary, cannot, it is submitted, be sustained.

upon another ground. He is under no duty to take artificial means to restore the barrier.[1] And whether he is the successor in title of the trespasser, or is a stranger, is, it is submitted, immaterial.[2]

Removal of barrier against sea.

The owner of the foreshore will not be permitted to remove shingle therefrom, so as to expose the foreshore to the inroads of the sea. For there is no analogy between the principles applicable to water pursuing occult courses and those applicable to a great visible bank operating as a protection against the visible waves of the sea.[3] And it is the duty of the Crown to preserve the realm from the inroads of the sea; at whose instance, therefore, a person who proceeds to destroy a natural barrier against the sea may be restrained.[4]

Non-natural user of property and no damage—no liability.

Not merely is a man, who uses his property according to the natural mode of its user, generally free from liability in respect of any ensuing damage to his neighbour. Where no actual damage has ensued, he is also free from liability, although his user be non-natural.[5]

Intercepted water—West Cumb., &c., Co. *v.* Kenyon.

And, in such a case, his merely temporarily intercepting, as he is entitled to intercept,[6] water, which would otherwise have percolated into his neighbour's property, does not lay him under an obligation to prevent such water from afterwards reaching that property. Thus, in *West Cumberland, &c., Co.* v. *Kenyon*,[7] water in a higher mine, which had previously found its way into certain old workings thereof, and had thence percolated into the lower mine, was tapped by and collected into a shaft sunk by the higher owner. The higher owner then made a borehole at the bottom of the shaft. It was admitted, that he did not do so in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to return the water to the old workings; and it thence percolated into the lower mine in the same way in which it would have done, if neither the shaft nor the borehole had been made. In fact the higher owner's operations had no

[1] Cf. Greenwell *v.* Low Beechburn Coal Co., 1897, 2 Q. B. 165; Hall *v.* Norfolk, 1900, 2 Ch. 493, *ante*, p. 445.

[2] See Clegg *v.* Dearden, 12 Q. B. 576; Smith *v.* Kenrick, 7 C. B. 515, 560.

[3] A.-G. *v.* Tomline, 14 Ch. D. 63.

[4] A.-G. *v.* Tomline, 12 Ch. D. 214; 14 Ch. D. 58.

[5] See West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 782.

[6] On the principle of Acton *v.* Blundell, 12 M. & W. 324; *ante*, p. 494.

[7] 11 Ch. D. 782.

effect whatever beyond the limits of his own property; and they did not cast upon the lower mine any burden, which that mine had not previously borne. The higher owner was held free from liability.[1]

Non-natural user of property and damage—liability.

Where, however, as the result of a man's non-natural mode of user, water, which had previously found its way by gravitation and percolation into his neighbour's mine, finds its way in greater quantities, a cause of action arises.[2] And even where it finds its way by a different channel or at a different time, although not in greater quantities, liability may be incurred. For the result may be to throw upon the neighbour's mine a burden which it had not borne before.[3] To escape liability, where damage ensues, the person who has caused the damage must show, that his operations have been ordinary, reasonable, and proper.[4] If, therefore, he is a higher mine owner, he must show, that he has acted prudently in the ordinary course of mining.[5] The removal of the surface by a higher owner, by means of which his mine is flooded, may possibly constitute an unreasonable or improper working, so as to give the injured party a remedy, if the removal is contrary to the usual course of working in the district.[6] But it does not do so on the mere ground, that it is in contravention of a covenant entered into by the higher owner with a third party.[7]

Tapping a stream—Crompton *v.* Lea.

A higher owner will not be justified in incautiously tapping a tarn, and so inundating the country below.[8] And if a higher owner commences to sink a shaft for the purpose of completing the working out of his mines; and the necessary result of allowing him to proceed will be, that the bed of a river will fall in, and the river flow into his workings, and thence into the lower owner's mine; he will be restrained. An act certain to

[1] Reversing *ib.* 6 Ch. D. 773.

[2] See Smith *v.* Kenrick, 7 C. B. 561; Rylands *v.* Fletcher, L. R. 3 H. L. 339; West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 782, 783, 785—790.

[3] West Cumb., &c., Co. *v.* Kenyon, *sup.*

[4] Smith *v.* Fletcher, L. R. 9 Exch. 64, 66, 67; Crompton *v.* Lea, 19 Eq. 129; Fletcher *v.* Smith, 2 A. C. 781; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174.

[5] Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34.

[6] Wilson *v.* Waddell, 2 A. C. 95, 100.

[7] *Ib.* The higher mine owner there held his property upon lease, and one of the covenants of the lease was, that, when the mines were worked out, he should restore the surface. This covenant he did not perform, and the performance of it would have prevented the injury complained of.

[8] Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34.

do irretrievable damage to the lower owner, and to endanger the lives of those in his employment, and to bring no advantage whatever to the higher owner, cannot be considered an ordinary, reasonable, and proper mode of working the higher mine.[1] And in none of such cases can the higher owner excuse himself on the ground, that the lower owner by previous workings in his own mine has removed minerals, which would otherwise have acted as a barrier against the water.[2]

A fortiori a higher owner will be liable for damage, if his operations have been negligent.[3] Negligence.

(β) *Natural Rights—Gravitation—Water present artificially.*

If a person, upon whose land it would not naturally come, brings upon his land, of his own mere will, and for his own purposes, and collects and keeps there, so dangerous an element as water, he does so at his peril; and he is, *primâ facie*, answerable for all the damage, which may result from its escape. Thus, in *Rylands* v. *Fletcher*,[4] the defendant constructed, for the purposes of a mill, a reservoir on a piece of land, adjoining which the plaintiffs were working mines. The plaintiffs had previously worked their mines up to a spot, where there were certain old passages of disused mines. Those passages were connected with vertical shafts, which communicated with the land above, which had been out of use for many years, and which were apparently filled with earth and marl. Shortly after the water was introduced into the reservoir, it broke through some of the old shafts, flowed through the old passages, and flooded the plaintiff's mine. The defendant was held liable.[5] And the result would have been the same if the disused mines had themselves been worked by the plaintiffs.[6] No statutory powers—*primâ facie* liability—Rylands *v.* Fletcher.

[1] Crompton *v.* Lea, 19 Eq. 115, 125—127, 129. The action was ultimately dismissed: see W. N. 1876, p. 266.

[2] Crompton *v.* Lea, 19 Eq. 130.

[3] See Smith *v.* Kenrick, 7 C. B. 515; Baird *v.* Williamson, 15 C. B., N. S. 391; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Crompton *v.* Lea, *sup.* 127; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174.

[4] L. R. 3 H. L. 330.

[5] See pp. 339, 340, 342, affirming Fletcher *v.* Rylands, L. R. 1 Exch. 265 (see 279, 280), which reversed *ib.* 3 H. & C. 774. See also Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 259, 270. As to the rights of other persons injured, see Cattle *v.* Stockton Waterworks, L. R. 10 Q. B. at 457.

[6] See Rylands *v.* Fletcher, L. R. 3 H. L. 342.

Substitution of new for old course of stream.

And where a higher owner, for his own convenience, diverts the course of a stream, he must take care that the substituted course shall be capable of conveying off the water, which might flow into it from all such floods and rainfalls as might reasonably be expected to happen in the locality.[1] And his duty in this respect cannot be affected by the mere circumstance that the cubical capacity of the new course may be equal to or greater than that of the old course; or by the circumstance that the old course may have been faulty or defective.[2] He will not be allowed, without incurring responsibility, to reproduce in the new course whatever defects existed in the old one.[3]

Effect of knowledge of probable damage.

It has been said, that the principle of *Rylands* v. *Fletcher* does not apply, if the mine owner knows the probable result of his workings, and nevertheless works, and damage ensues. He "saw the danger, and may be said to have courted it."[4] This dictum is, however, of doubtful correctness. In such a case the mine owner is merely exercising his lawful rights, without which he could not enjoy his property.[5]

Liability irrespective of negligence or unusual user.

Where a higher owner is liable for an injury which the lower owner may sustain through an escape of water, such liability is wholly irrespective of any question as to negligence, or unusual or unreasonable user.[6]

Statutory freedom from liability—Dunn *v.* Birmingham Canal Co.

Different considerations may sometimes apply, where the rights and obligations of adjoining owners are to be found within the provisions of an Act of Parliament, which authorises the construction of works of public utility and convenience. Thus in *Dunn* v. *Birmingham Canal Co.*,[7] the facts of which have been already fully stated.[8] The plaintiff (amongst other contentions [9]) relied on *Rylands* v. *Fletcher*.[10] It was, however,

[1] See the dicta in Smith *v.* Fletcher, L. R. 7 Exch. 312, 313, 9 *ib.* 65; Fletcher *v.* Smith, 2 A. C. 787 *et seq.*; nom. Smith *v.* Musgrave, 47 L. J. Q. B. 4.

[2] Fletcher *v.* Smith, *sup.*

[3] *Ib.*: see A.-G. *v.* Tomline, 12 Ch. D. 228, 229.

[4] See Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 258, 260, *per* Cockburn, C. J.

[5] See pp. 283, 284, *per* Hannen, J. No opinion was expressed on this point in Exch. Cham.: see L. R. 8 Q. B. 42.

[6] See Fletcher *v.* Rylands, 3 H. & C. 789, L. R. 1 Exch. 279, 285, 286; Rylands *v.* Fletcher, L. R. 3 H. L. 340—342.

[7] L. R. 7 Q. B. 244; 8 *ib.* 42.

[8] *Ante*, p. 357.

[9] *Ib.*

[10] L. R. 3 H. L. 330; *ante*, p. 515.

held, that the defendants had acted strictly within the powers given to them by the Act; and that the principle of *Rylands* v. *Fletcher* did not, therefore, apply.[1] It will be noticed,[2] that the Act, which applied in *Dunn* v. *Birmingham Canal Co.*, also applied in *Dudley Canal Co.* v. *Grazebrook*.[3] Accordingly, while the mine owner was held to be without a remedy by action against the canal owners for the flooding of his mines, the canal owners would, in the events which had happened, if they had sought relief against the mine owner for draining away their canal, have been equally without a remedy.

Pub. Health Act, 1875.

On similar principles a local authority, who made sewers under the Pub. Health Act, 1875, were not, *primâ facie*, liable, if the sewage percolated into the subjacent mines. For they were entitled to have the sewers supported by the mines;[4] and the percolation could only therefore have ensued from the wrongful act of the mine owner.[5]

Where danger of flooding.

It does not, however, follow, that a mine owner, who has no remedy by action for damage from flooding, has no remedy of any kind where there is danger of flooding. It has been already seen,[6] that, in cases like *Dunn* v. *Birmingham Canal Co.*,[7] he could probably have availed himself of the compensation clauses of the Act. So it has been seen,[8] that if, in cases like *Chamber Colliery Co.* v. *Rochdale Canal Co.*,[9] he had shown the probability of flooding, he could have compelled the purchase of the right of support.

Where Wat Cl. Act applies.

And the principle laid down in *Rylands* v. *Fletcher*[10] applies, by virtue of section 27[11] of the Wat. Cl. Act, to all cases of waterworks constructed under Acts incorporating the Wat.

[1] Cf. Sutton *v.* Clarke, 6 Taunt. 29; Whitehouse *v.* Birmingham Canal Co., 27 L. J. Ex. 25; Whitehouse *v.* Fellows, 10 C. B., N. S. 765. If and so far as Barber *v.* Nottingham, &c., R. Co. (15 C. B., N. S. 726) is inconsistent with Dunn *v.* Birmingham Canal Co., it must be considered to be overruled. It was treated by Mellor, J. (Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 269), as having proceeded upon the ground of actual negligence on the part of the defendants; but see the judgment, 15 C. B., N. S. at p. 748.

[2] See *ante*, pp. 354, 357.

[3] 1 B. & Ad. 59; *ante*, p. 354.

[4] See *ante*, pp. 348, 349.

[5] *Re* Dudley, 8 Q. B. D. 86, 95, 96. See now the Pub. Health Am. Act 1883, *ante*, pp. 377—379, 428 *et seq.*; and cf. the law thereunder, *infra*.

[6] *Ante*, p. 359.

[7] L. R. 7 Q. B. 244, 8 *ib.* 42.

[8] *Ante*, pp. 358—360.

[9] 1895, A. C. 564.

[10] *Ante*, p. 515.

[11] See this section cited *ante*, p. 377.

Cl. Act.[1] It equally applies to all cases of sanitary works constructed under the Pub. Health Am. Act, 1883; section 3 of the latter Act applying to sanitary works the provisions of the Wat. Cl. Act with respect to mines.[2]

Where construction or maintenance improper.

And if the rights and obligations of a railway or canal company or other corporation are regulated by an Act of Parliament; and the company or corporation would, on the principle of *Dunn* v. *Birmingham Canal Co.*, be in other respects free from liability; they may become liable, if the works authorised to be executed by them have been constructed [3] or maintained [4] improperly, or contrary to the provisions of their Act. And if they are liable on other grounds, their liability is none the less merely because no damage would in fact have happened but for the wrongful act of a third party.[5] And in all such cases every fresh damage from a continuance of the wrongful act is a distinct cause of action.[6]

Accommodation works.

The mine owner cannot, however, obtain an order against a railway company to maintain works made for their own convenience on the footing that they are accommodation works, which they are bound, under section 68 of the Rail. Cl. Act, to make and maintain "for the accommodation of the owners and occupiers of lands adjoining the railway." The question as to what are accommodation works is one to be determined at the time of the construction of the railway. And, apart from this, a mine owner is not an owner of "lands adjoining the railway." [7]

[1] See Holliday *v.* Wakefield, 1891, A. C. 87, 88, *per* Lord Bramwell, 90, *per* Lord Halsbury, 101, *per* Lord Watson, and 103, *per* Lord Herschell; and *ante*, p. 424.

[2] See *ante*, p. 378; cf. the law under the Pub. Health Act, 1875, *ante*, p. 517.

[3] Whitehouse *v.* Fellows, 10 C. B., N. S. 765; Barber *v.* Nottingham, &c., R. Co., 15 *ib.* 726. See observations on the latter case in Fletcher *v.* Rylands, L. R. 1 Exch. 277; Dunn, *v.* Birmingham Canal Co., L. R. 7 Q. B. 269. See also *ante*, p. 517, n. [1].

[4] Bagnall *v.* L. & N. W. R. Co., 7 H. & N. 423, 1 H. & C. 544; Evans *v.* M. S. & L. R. Co., 36 Ch. D. 626. In Bagnall *v.* L. & N. W. R. Co., the claim was held not to be one enforceable under the compulsory clauses of the Act; the plaintiff not having been injuriously affected by the works, but by the company's wrongful conduct with respect to them. See observations on this case in Fletcher *v.* Rylands, *sup.* 271; Dunn *v.* Birmingham Canal Co., *sup.* 267—269. See also Whitehouse *v.* Birmingham Canal Co., 27 L. J. Exch. 25.

[5] Evans *v.* M. S. & L. R. Co., *sup.*

[6] Whitehouse *v.* Fellows, *sup.*; Evans *v.* M. S. & L. R. Co., *sup.*

[7] R. *v.* Fisher, 3 B. & S. 191. The

(γ) *Natural Rights—"Vis Major"—Act of God, &c.*

No liability, where *vis major*, or act of God, or of third party.

Upon the same principle that a man is, *primâ facie*, free from liability, if water escapes from his property to that of his neighbour by the mere force of gravitation, he is, *primâ facie*, free from liability, if the escape is the consequence of *vis major*,[1] or is the act of God.[2] And a person, from whose property water would otherwise inevitably have escaped by the act of God, does not become a wrongdoer, merely because, in order to prevent or mitigate a calamity, he voluntarily does an act which expedites the escape.[3] A similar principle prevails where the escape is the act of a third party;[4] and, *à fortiori*, where it is due to the neighbour's own default.[5] And these observations apply even to cases like *Rylands* v. *Fletcher*;[6] where the person sought to be made liable has brought a body of water upon his land, which would not naturally have come upon it.[7]

(δ) *Acquired Rights.*

Right to protection against escape of water may be acquired.

A right may be acquired as an easement by grant, either voluntary or statutory, to protection against the escape of water by gravitation, or its flow in its natural course.[8] But it is difficult, if not impossible, to acquire such a right by prescription. For the enjoyment of the right could hardly be free from the objection of precariousness.[9]

works were the same as those in question in Bagnall *v.* L. & N. W. R. Co., cited on the preceding page.

[1] See Fletcher *v.* Rylands, L. R. 1 Exch. 280; Rylands *v.* Fletcher, L. R. 3 H. L. 340, *per* Blackburn, J.

[2] See Fletcher *v.* Rylands, *sup.*; Rylands *v.* Fletcher, *sup.*; Fletcher *v.* Smith, 2 A. C. 787, 788.

[3] Thomas *v.* Birmingham Canal Co., 43 L. T. 435.

[4] Box *v.* Jubb, 4 Exch. D. 76.

[5] Fletcher *v.* Rylands, L. R. 1 Exch. 280; Rylands *v.* Fletcher, L. R. 3 H. L. 340.

[6] L. R. 3 H. L. 330: see *ante*, p. 515.

[7] See Rylands *v.* Fletcher, *sup.* 340; Fletcher *v.* Smith, 2 A. C. 787, 788; Box *v.* Jubb, *sup.*: cf. Evans *v.* M. S. & L. R. Co., 36 Ch. D. 626.

[8] See Smith *v.* Kenrick, 7 C. B. 515, 564; Ross *v.* Rugge-Price, 1 Ex. D. 269; Brain *v.* Thomas, 50 L. J. Q. B. 662. The two latter cases were decided under r. 19 of sch. 2 of the Forest of Dean Coal award of 1841, mentioned p. 554 of the 3rd edition of this book. See generally, rr. 19 and 18 respectively of sch. 2 of the Coal and Iron awards of 1841, mentioned *ib.* See the Waterworks Cl. Act, s. 27, cited *ante*, p. 377.

[9] See and consider Mason *v.* Shrewsbury, &c., Co., L. R. 6 Q. B. 584.

c.—COMBINED EFFECTS OF DISCHARGE AND ESCAPE.

Combined effects of discharge and escape.

Where a mine on a lower level is damaged by an influx of water from the higher mine; and such influx is due to separate and distinct causes, some of which the higher owner is, and others of which he is not, under a duty to control; the higher owner will be liable for so much of the damage as can be attributed to the former causes; and he will be free from liability for so much as can be attributed to the latter.[1]

d.—REMEDIES.[2]

Previously specified remedies.

Sometimes particular remedies are specified by anticipation for the damage which may be sustained by an influx of water; in such a way that those remedies only are available. Where this is so, care should be taken, that the specified remedies are pursued.[3] Where the specified remedy is compensation, the injured party cannot have an injunction.[4]

Ordinary remedies—damages.

Subject to the necessity in proper cases of pursuing specified remedies, a man may be made liable in damages, who discharges water from his mine upon the property of his neighbour, or drains his mine through the property of his neighbour; without having the right to do so.[5]

Measure of damages—waterleave rent.

And the measure of damages is the value of the land for the purposes for which it has been used. The injured party may obtain compensation by way of waterleave rent, at the rate (if any) usual in the neighbourhood, upon all minerals gotten out of the wrongdoer's mine which have been drained through the land of the injured party.[6] The fact, that the injured party is a lessee with a short term, may affect the measure of damages: either in his favour; having regard

[1] See Baird *v.* Williamson, 15 C. B., N. S. 376. See also Smith *v.* Fletcher, L. R. 9 Ex. 64, 67; reversing S. C. 7 *ib.* 305.

[2] Cf. the law in the case of roadways, *ante*, pp. 486 *et seq.*

[3] See Dunn *v.* Birmingham Canal Nav., L. R. 7 Q. B. 244, 8 *ib.* 42, *ante*, pp. 357, 516; Evans *v.* M. S. & L. R. Co., 36 Ch. D. 626: cf. Bagnall *v.* L. & N. W. R. Co., 7 H. & N. 423, 1 H. & C. 544.

[4] Evans *v.* M. S. & L. R. Co., *sup.*

[5] Haward *v.* Bankes, 2 Burr. 1114; Firmstone *v.* Wheeley, 2 D. & L. 203; Baird *v.* Williamson, 15 C. B., N. S. 376; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Craven *v.* Kaye, Set. 577; Fletcher *v.* Smith, 2 A. C. 781.

[6] See Plant *v.* Stott, 21 L. T., N. S. 106; Jegon *v.* Vivian, 6 Ch. 742; Phillips *v.* Homfray, *ib.* 770. See also the cases as to wayleave rent, *ante*, pp. 486, 487. For the form of an inquiry, which will be made with a view to providing such compensation, see Phillips *v.* Homfray, *sup.* 776.

to the probable loss of the mineral which the injury may cause: or in favour of the wrongdoer; having regard to the contingency, that the injured party may refrain from removing the water, and leave the wrongdoer subject to an action by the reversioner.[1]

Injunction.

The injured party will also in general be entitled to an injunction to restrain the future user.[2] And, for this purpose, it is immaterial that no special injury can be done him by a continuation of the user.[3] And if a man makes an aperture in his neighbour's land for the purpose of draining his mine through it; without having the right to do so; he may, in general, be compelled by mandatory injunction to stop such aperture up.[4] The mandatory injunction may be directed even on interlocutory application.[5] And it may have effect given to it under the superintendence of a special referee.[6] An injunction will be refused, if it would be practically impossible to comply with it.[7]

Abatement.

The injured party may also treat the invasion of water as a nuisance; and abate it accordingly.[8] And although, if there are two ways of abating it, he must, in general, choose the less mischievous, he need not do so, if some injury would be thereby done to an innocent third party, or to the public.[9] And he does not become liable to the wrongdoer, merely because, in order to prevent that injury, he trespasses upon the land of the third party.[10]

Inspection.

A litigant, who has a *primâ facie* case, may usually obtain on terms, on interlocutory application, liberty to inspect his neighbour's property.[11]

[1] See Smith *v.* Fletcher, L. R. 7 Exch. 313.

[2] Beaufort *v.* Morris, 6 Ha. 340; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478; Lomax *v.* Stott, 39 *ib.* 834; Jegon *v.* Vivian, *sup.*; Phillips *v.* Homfray, *sup.*; Craven *v.* Kaye, Set. 577; Eardley *v.* Granville, 3 Ch. D. 826. For the form of an injunction to restrain an improper user for drainage purposes, see Hilton *v.* Woods, Set. 578, 579.

[3] See and consider Powell *v.* Aiken, 4 K. & J. 343.

[4] See *ib.*; Plant *v.* Stott, 21 L. T., N. S. 106. See also Walker *v.* Fletcher, 3 Bli. 172, n., 178, n.

[5] See Walker *v.* Fletcher, *sup.*; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478. For the form of such injunction, see Westminster, &c., Co. *v.* Clayton, *sup.*, p. 478, Set. 577.

[6] See Craven *v.* Kaye, Set. 577; cf. Walker *v.* Fletcher, *sup.*

[7] Evans *v.* M. S. & L. R. Co., 36 Ch. D. 626.

[8] See Roberts *v.* Rose, 3 H. & C. 162; L. R. 1 Exch. 82, 89, 90.

[9] *Ib.*

[10] *Ib.*

[11] See *ante*, p. 491. For forms of

Sect. 4.—AIR.

No right, *primâ facie*, to make airway in neighbour's property.

As in the case of water,[1] so in the case of air, a man has no right, *primâ facie*, to make an airway through or in his neighbour's property for the purpose of ventilating his own property.[2]

Right to ventilate without making such airway.

And apparently, although he makes no airway through or in his neighbour's property, a man has no right, *primâ facie*, to be an active instrument in ventilating his own property by means of his neighbour's; whether he does so by sending air from his own property into his neighbour's, or by drawing air from his neighbour's into his own.[3] On the other hand, a man is, *primâ facie*, free from liability, if his own property is ventilated by means of his neighbour's through the mere operation of natural causes.[4]

Rail. & Wat. Cl. Acts, &c.

A landowner, whose land is compulsorily purchased by a railway company, under the authority of the Rail. Cl. Cons. Act, 1845; who possesses mines under the railway, or within the prescribed distance, or, where no distance is prescribed, within forty yards therefrom, which he is prevented from working by reason of apprehended injury thereto; and who possesses other adjoining mines, which extend so as to lie upon both sides of the railway; has under the Act a right to make airways between such other mines through the intervening land for ventilating purposes.[5] And the Wat. Cl. Act [6] contains somewhat similar provisions.

Other statutory grants.

Mining easements in respect of air may also be exercised under the Incl. Act, 22 & 23 Vict. c. 43; [7] and by the Duke of Cornwall and his lessees under the Act 7 & 8 Vict. c. 105.[8]

Remedies.

If a man wrongfully uses his neighbour's property for the

orders to inspect, see *post*, p. 546, n. [1]. A person, who conveys water into a mine, is sometimes guilty of felony; and punishable accordingly: see *post*, p. 551.

[1] *Ante*, p. 507.

[2] Powell *v.* Aiken, 4 K. & J. 343; Bowser *v.* Maclean, 2 De G. F. & J. 415, 421.

[3] By analogy to the law in the case of water, as to which see *ante*, p. 507.

[4] See Jegon *v.* Vivian, 6 Ch. 759; Powell *v.* Vickerman, 3 T. L. R. 358.

[5] See ss. 80, 82, of the Act, cited *ante*, pp. 372, 373.

[6] See s. 24 of the Act, cited *ante*, p. 376.

[7] *Ante*, pp. 459, 460.

[8] *Ante*, pp. 460, 461.

purpose of ventilating his own, the injured party may obtain compensation by way of air-leave rent.[1] And his right to an injunction is similar to the rights in the case of roadways and water, which have been already stated.[2]

[1] See and consider Powell *v.* Aiken, 4 K. & J. 343, 356; Bowser *v.* Maclean, 2 De G. F. & J. 415; Jegon *v.* Vivian, 6 Ch. 762, 763; Phillips *v.* Homfray, *ib.* 776, 781: see also the cases as to wayleave rent, *ante*, pp. 486, 487.

[2] *Ante*, pp. 487, 521.

CHAPTER XVIII.

NEIGHBOURS—SMOKE AND FUMES.[1]

(*a*) *Brick-burning.*

No right to burn bricks, if nuisance created.

A MAN has no right to burn bricks on his land, although made of his own clay, if a nuisance would be thereby created.[2] And he cannot justify the nuisance by saying, that it is done at a convenient time and place, and is a reasonable user of the land; or is *pro bono publico*.[3] And where a nuisance is established, the injured party is not precluded from complaining on the mere ground, that there is another nuisance of the same kind in the neighbourhood;[4] or that other persons suffering from the same nuisance do not complain.[5]

But nuisance is a question of fact.

However, the question, whether a nuisance is created, is one of fact in each particular case. It is not, for instance, a question of mere proximity. Burning bricks within 48 yards,[6] or 60 yards,[7] or 180 yards,[8] or 200 yards,[9] or 240 yards,[10] or even 653 yards,[11] from a house, or pleasure grounds, or a conservatory, has been held to be a nuisance. But, on the other hand, burning bricks within 140 yards from a cottage may not be a nuisance.[12] Nor should the facts of the time and place being convenient, or the fact of the user being

[1] The general principles, which apply to questions of support, apply equally to the questions discussed in this chapter. See, as to support, *ante*, pp. 287, 288.

[2] Walter *v.* Selfe, 4 De G. & Sm. 315, 324; Pollock *v.* Lester, 11 Ha. 266; Bamford *v.* Turnley, 3 B. & S. 62.

[3] Walter *v.* Selfe, *sup.*; Bamford *v.* Turnley, *sup.*; Cavey *v.* Ledbitter, 13 C. B., N. S. 470; Shotts Iron Co. *v.* Inglis, 7 A. C. 528, 543; overruling Hole *v.* Barlow, 4 C. B., N. S. 334. See also Beardmore *v.* Tredwell, 3 Giff. 683.

[4] Walter *v.* Selfe, *sup.* 323.

[5] Luscombe *v.* Steer, 15 W. R. 1193.

[6] Walter *v.* Selfe, *sup.* 321.

[7] Pollock *v.* Lester, *sup.*

[8] Bamford *v.* Turnley, *sup.*; A.-G. *v.* Tossell, Set. 611.

[9] Barwell *v.* Brooks, 15 Jur. 418, n.

[10] Roberts *v.* Clarke, 18 L. T., N. S. 49.

[11] Beardmore *v.* Tredwell, 3 Giff. 701; see Luscombe *v.* Steer, 15 W. R. 1191.

[12] See Luscombe *v.* Steer, *sup.*; see Grafton *v.* Hilliard, Amb. 160, n., cited in A.-G. *v.* Cleaver, 18 Ves. 219, and in 4 De G. & Sm. 326.

reasonable, be wholly disregarded.[1] And brick-making is not necessarily a "noxious or offensive trade, business, or manufacture," within the meaning of section 112 of the Pub. Health Act, 1875.[2] In each particular case, to create a nuisance, substantial inconvenience and material discomfort must be shown.[3]

Person liable.

The person who creates a nuisance is not of necessity alone liable. If the owner of land grants a licence to burn bricks thereon, and the licence is revocable, and the licensee's acts create a nuisance, the licensor, as well as the licensee, may be made liable.[4] But it is otherwise, if he grants a lease or an irrevocable licence. For he then parts with all control over the user of the land.[5]

Remedies.

Where a nuisance is established, an injunction will, in general, be granted to restrain it.[6] And the mere fact, that a remedy in penalties may be available under the Pub. Health Acts, does not affect the right to have an information at the relation of the local authority to obtain an injunction.[7] An injunction may also, in general, be had to restrain a threatened nuisance.[8] But it may be proper to refuse an injunction where damages are an adequate remedy.[9]

Burning near highways.

Persons are bound under penalties not to make any fire for burning bricks within fifteen yards from any part of a carriage-way or cart-way, unless screened therefrom.[10]

(β) *Iron-calcining, Copper-smelting, Lime-burning, &c.*

Similar principles in case

Similar principles are applicable in the case of iron works,[11]

[1] Luscombe *v.* Steer, *sup.* 1192.

[2] See Wanstead Local Board *v.* Hill, 13 C. B., N. S. 479; a decision under the repealed Act, 11 & 12 Vict. c. 63, s. 64.

[3] See Walter *v.* Selfe, 4 De G. & Sm. 315, 322, 325.

[4] White *v.* Jameson, 18 Eq. 303. See, as to revocable and irrevocable licences, *ante*, pp. 271, 272.

[5] White *v.* Jameson, *sup.*: cf. Atkinson *v.* King, 2 L. R. (Ir.) 320. See, further, *post*, pp. 526, 527.

[6] Walter *v.* Selfe, *sup.*; Pollock *v.* Lester, 11 Ha. 275; Roberts *v.* Clarke, *sup.* 49. The form of the injunction will, if so claimed, be "so as to occasion a nuisance to the plaintiff as the owner or occupier," &c. See Buffy *v.* Stevens; Haywood *v.* Richards, Set. 604. See also Walter *v.* Selfe, *sup.* 326. For the form of an order, restraining the burning of bricks other than those actually burning in clamps, and not to continue such burning beyond a week, see Pollock *v.* Lester, *sup.*

[7] A.-G. *v.* Tossell, Set. 611.

[8] See Luscombe *v.* Steer, *sup.* 1192.

[9] *Ib.* 1193.

[10] 5 & 6 Will. 4, c. 50, s. 70.

[11] Shotts Iron Co. *v.* Inglis, 7 A. C.

of iron, copper, or lime works, &c.

copper works,[1] coke ovens,[2] cement works,[3] and chalk works or lime works.[4] In each of these cases, if a nuisance is shown to exist, a remedy may, in general, be had. And it is no objection to the remedy, that the person seeking it has come to the nuisance.[5]

But nuisance is a question of fact.

But, as in the case of brick-burning, an actual substantial nuisance must be established. Sentimental grievances; or prospective, contingent, or remote, cases of nuisance; will not be allowed to interfere with the great industries of the country: especially where the persons who complain reside in the seats of those industries.[6]

Pub. Health Act.

The provisions of the Pub. Health Act, 1875, do not extend to mines, so as to interfere with or obstruct the efficient working of the same; or to the smelting of ores and minerals; or to the calcining, puddling, and rolling of iron and other metals; or to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes.[7] On the face of it, this exemption applies only where there is an interference with, or obstruction of, the working or the processes.[8] And it extends only to liability under the provisions of the Act, and is not a protection against the common law liability.[9]

Person liable.

As in the case of brick-burning,[10] the person who creates a nuisance is not of necessity alone liable. If the owner of a lime quarry demises it, and authorises the lessee to create

518: see the form of the injunction. As to fixing a limitation of distance, see *ib.*, where a mile was fixed.

[1] See Walter *v.* Selfe, 4 De G. & Sm. 324; Bankart *v.* Houghton, 27 Beav. 425; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642; Tipping *v.* St. Helen's Smelting Co., 1 Ch. 66. For the form of an injunction, see A.-G. *v.* Staffordshire, &c., Co., Set. 605.

[2] Salvin *v.* North Brancepeth Coal Co., 9 Ch. 705.

[3] Umfreville *v.* Johnson, 10 Ch. 580. For the form of an injunction, see A.-G. *v.* Francis, Set. 605.

[4] See Walter *v.* Selfe, *sup.*; St. Helen's Smelting Co. *v.* Tipping, *sup.*

[5] Tipping *v.* St. Helen's Smelting Co., *sup.*

[6] See Salvin *v.* North Brancepeth Coal Co., *sup.* 710; Shotts Iron Co. *v.* Inglis, *sup.* 543: see also St. Helen's Smelting Co. *v.* Tipping, *sup.*

[7] See s. 334. See *Re* Dudley, 8 Q. B. D. 86, 95, 96, 97.

[8] See Patterson *v.* Chamber Coll. Co., 8 T. L. R. 278.

[9] A.-G. *v.* Logan, 1891, 2 Q. B. 100: cf. Norris *v.* Barnes, L. R. 7 Q. B, 537, a decision under the repealed Act 18 & 19 Vict. c. 121, s. 44.

[10] *Ante*, p. 525.

a nuisance by means of blasting operations and smoke, he is liable as well as the lessee.[1]

Loss of remedy.

Encouragement followed by expenditure may be a bar to a remedy, which might otherwise be obtained.[2] But acquiescence in a nuisance, which produces little injury, does not warrant a subsequent extension, which produces great injury.[3]

Calcining, &c., near highways.

Persons are bound under penalties not to make any fire for calcining or burning ironstone, limestone, or clay, or making cokes, within fifteen yards from any part of a carriage-way or cart-way, unless screened therefrom.[4]

[1] Harris *v.* James, 45 L. J. Q. B. 545.

[2] Williams *v.* Jersey, 1 Cr. & Ph. 91; see also Bankart *v.* Houghton, 27 Beav. 425.

[3] Bankart *v.* Houghton, *sup.*

[4] 5 & 6 Will. 4, c. 50, s. 70.

CHAPTER XIX.

STRANGERS—WRONGFUL POSSESSION—WRONGFUL ABSTRACTION—MALICIOUS INJURIES.

a.—STRANGERS—WRONGFUL POSSESSION.

(*a*) *Existence of Remedies.*

Recovery of possession.

Possession may be recovered in respect of mines, whether open or unopened,[1] if such mines and the overlying surface are possessed by the same person, and the remedy in respect of the mines is merely a part of the remedy in respect of the whole *solum* from the surface down to the centre.[2] And it may be recovered in respect of open [1] mines, as the distinct subject-matter of an action.[3] Whether it may be recovered in respect of unopened [1] mines as the distinct subject-matter of an action, was, prior to the case of *Low Moor Co.* v. *Stanley Coal Co.*,[4] a question upon which there was no very distinct authority.[5] It was, however, stated in that case, that there may be a corporeal right to unopened mines; of which of course possession may be recovered.[6]

[1] As to open and new mines, see *ante*, pp. 55 *et seq.*

[2] See Harebottle *v.* Placock, Cro. Jac. 21; Goodtitle *v.* Alker, 1 Burr. 143; Crocker *v.* Fothergill, 2 B. & Al. 660.

[3] See Comyn *v.* Kyneto, Cro. Jac. 150; Comyn *v.* Wheatley, Noy, 121; Sanders *v.* Partridge, *ib.* 132; Whittingham *v.* Andrews, 1 Salk. 255; nom. Andrews *v.* Whittingham, Carth. 277 (a case of coal mines in Durham, where the number of them was not mentioned); Rich *v.* Johnson, 2 Str. 1142; Port *v.* Turton, 2 Wils. 172; Sayer *v.* Pierce, 1 Ves. Sen. 232; Rose *v.* Nixon, 2 J. & W. 555. See also Doe *v.* Alderson; Smirke's Rep. of Vice *v.* Thomas; Bowser *v.* Colby, 1 Ha. 114; Dartmouth *v.* Spittle, 19 W. R. 445. See, however, the dictum in Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108, a case of open quarries. See also Vice *v.* Thomas, *sup.*; and Burt. Comp. 364. See, as to licences, *ante*, p. 269; as to tin bounds, p. 484 of the 3rd edition of this book.

[4] 34 L. T., N. S. 186.

[5] Upon the point in question, see Sayer *v.* Pierce, 1 Ves. Sen. 232, 233; Wilkinson *v.* Proud, 11 M. & W. 33. The sheriff could not have given possession of unopened mines: see Cole on Eject. 91.

[6] *Per* Lord Cairns. This was in the same case doubted by Mellish, L. J.;

And proceedings are maintainable to establish a title to mines. Even before the Judicature Acts, although the legal estate might not have been outstanding, such proceedings were almost always maintainable in equity;[1] either on the ground, that mines were a species of trade, and that the taking of an account was usually required;[2] or on the ground, that the mine in question might be ruined, if it were necessary to wait for the legal remedy;[3] or on the ground, that a question as to confusion of boundaries was usually involved.[4]

Establishment of title —generally.

(β) *Loss of Remedies.*

A title to mines or quarries, as part of the entire *solum* from the surface down to the centre, is capable of acquisition under the Limit. Acts.[5] And it would appear, that, to acquire such a title, it is not necessary that the surface should be inclosed or fenced. It has been laid down, that in such a case adverse possession may be acquired by an user, such as a farmer might exercise over his farm.[6]

Limit. Acts—mines or quarries as part of entire *solum*.

A title to mines or quarries, whether open or unopened,[7] as a separate subject-matter, is also capable of acquisition under the Limit. Acts, if the person claiming them has already the exclusive right to the surface.[8] And if his acts show such a possession of them as, if he were not already entitled to the surface, would have enabled him to acquire a title to them as part of the entire *solum* from the surface down to the centre, they will enable him to acquire a title to them as a separate

Mines or quarries as separate subject-matter.

in consequence of the passage in Shep. Touch., cited *ante*, p. 223, n. [2], see also *ib.* 23. Mellish, L. J., construed the passage as meaning, that in every case a right to dig mines was a mere incorporeal hereditament. But Lord Cairns construed it as merely meaning, that in every case the particular language of a deed should be examined in order to ascertain the intention.

[1] See Story *v.* Windsor, 2 Atk. 630; Falmouth *v.* Innys, Mosely, 89.

[2] Story *v.* Windsor, *sup.* See also *ante*, p. 95, n. [5], and other cases there cited.

[3] Falmouth *v.* Innys, *sup.*

[4] Sayer *v.* Pierce, 1 Ves. Sen. 233; see also Vice *v.* Thomas, Smirke. As to production of documents in cases as to boundaries, see Earp *v.* Lloyd, 3 K. & J. 549; Adams *v.* Lloyd, 3 H. & N. 351; Jenkins *v.* Bushby, 35 L. J. Ch. 400; Ponsonby *v.* Hartley, W. N. 1883, 13, 44. See also *post*, p. 546.

[5] 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

[6] See Seddon *v.* Smith, 36 L. T., N. S. 168, 169. Cf. the law in the case of licences, *ante*, pp. 269—274.

[7] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[8] See Thew *v.* Wingate, 10 B. & S. 714, n., 721, n., *per* Blackburn, J.

subject-matter.[1] And a title to mines or quarries, whether open or unopened,[2] as a separate subject-matter, is equally capable of acquisition, where the person claiming them has not already the exclusive right to the surface.[3] For the same principle must apply, where mines or quarries are approached laterally, as that, which applies where they are approached vertically. And in the case of unopened [2] mines forming a separate subject-matter, it has been held, that where a tenancy at will had been established by an entry into possession under an unenrolled bargain and sale, the Statute of Limitations began to run from the first year of such tenancy; so as, after the proper lapse of time, to perfect the title of the bargainee.[4] And an unmistakable adverse possession would probably be shown, if the mine or quarry in question were surrounded on all sides with galleries, and a certain defined area so opened out.[5]

Undivided part of mines or quarries.

A title to an undivided part of mines or quarries is capable of acquisition under the Limit. Acts.[6]

Containing chamber—underground tunnel.

A title to the cavity from which minerals are extracted is also capable of acquisition under the Limit. Acts.[7] And the exclusive occupation and possession of an underground tunnel for more than twelve years confers a right to it under the Limit. Acts. It does not need a possession for twenty years, as if it were merely an easement.[8]

Spoil-bank.

A title to a spoil-bank is also capable of acquisition under the Limit. Acts.[9]

Acts of ownership—presumption of property.

The effect to be attributed to acts of ownership, as raising a presumption of property or possession, is a question which frequently arises under the Limitation Acts, and is of great importance. It has been already considered.[10]

[1] See *ante*, p. 529, n. [8]. As to Scotch law, see Fleeming *v.* Howden, 6 M. 783; Millar *v.* Lansdowne, 1910, S. C. 618.

[2] As to open and new mines or quarries, see *ante*, pp. 55 *et seq.*

[3] See Dartmouth *v.* Spittle, 19 W. R. 445.

[4] Low Moor Co. *v.* Stanley Coal Co., 34 L. T. 186, *per* Lords Cairns and Coleridge. Mellish, L. J., doubted whether the statute could apply; on the ground, that ejectment would not have lain; see *ante*, p. 528, n. [6]. Cf. Story *v.* Windsor, 2 Atk. 630, 632.

[5] See Ashton *v.* Stock, 6 Ch. D. 726. See also Seaman *v.* Vawdrey, 16 Ves. 392; Mawson *v.* Fletcher, 10 Eq. 214, 219, 6 Ch. 94; Thompson *v.* Hickman, 1907, 1 Ch. 550.

[6] Glyn *v.* Howell, 1909, 1 Ch. 666. See the facts stated *ante*, p. 80.

[7] *Ib.*: see pp. 675, 677.

[8] Bevan *v.* London Portland Cement Co., 67 L. T. 615.

[9] Marshall *v.* Borrowdale, 8 T. L. R. 275.

[10] *Ante*, pp. 77 *et seq.*

Mere non-user by a mine owner, no matter for how long a time, will not, however, give the surface owner a title to mines or quarries by prescription. In the case of other kinds of property the inference of an abandonment of a right by a non-user may fairly be made. But not in the case of mines. For mines are frequently purchased or excepted for the express purpose of keeping them unwrought until other mines shall be exhausted. These propositions were laid down long before the first Real Prop. Limit. Act [1] came into operation.[2] Indeed in one case it was laid down, that there could be no presumption of a grant of mines, in the face of an express exception on a sale many years previously; although the mine owner had permitted an expenditure by the surface owner in respect of the mines without making any claim thereto.[3] And the Limit. Acts have not made any change in the law. In *McDonnell* v. *McKinty*,[4] a case decided since the first of them came into operation, it was said:—"Discontinuance means an abandonment of possession by one person followed by the actual possession of another person. . . . Only by user of them, or by some unequivocal act of possession," can a person who has excepted mines from a sale be dispossessed by lapse of time.[5] ". . . Mines from their nature are exempted from the presumption, which non-user justifies in other kinds of property; for mines are frequently purchased or excepted with a view to their being opened and worked at a future time." [6] The Limit. Acts do not apply to the mere want of actual possession by the owner; but to cases where the owner has been out of possession, and some other person has been in possession.[7] *Thew* v. *Wingate* [8] is an example of the acts of possession which will be regarded as "unequivocal." [9]

Non-user—generally.

The observations in *McDonnell* v. *McKinty* are not, it will

Purchase and exception

[1] 3 & 4 Will. 4, c. 27.

[2] See Seaman *v.* Vawdrey, 16 Ves. 392: see also Crang *v.* Adams, 5 B. P. C. 588; Hodgkinson *v.* Fletcher, 3 Doug. 31; Adair *v.* Shaftoe, cited, 19 Ves. 156.

[3] Adair *v.* Shaftoe, *sup.*

[4] 10 Ir. L. R. 514.

[5] P. 526.

[6] P. 527: cf. Jamieson *v.* Harvey, W. N. 1876, p. 277.

[7] Smith *v.* Lloyd, 9 Exch. 562, 572; Thew *v.* Wingate, 10 B. & S. 719, n., 720, n.; Smith *v.* Stocks, *ib.* 701; Dartmouth *v.* Spittle, 19 W. R. 445; Agency Co. *v.* Short, 13 A. C. at 799. See also Low Moor Co. *v.* Stanley Coal Co., 33 L. T., N. S. 436 (affd. 34 *ib.* 186); and cf. Tottenham *v.* Byrne, 12 Ir. C. L. Rep. 383, 385.

[8] 10 B. & S. 714, n.

[9] See the facts stated, *ante*, p. 80.

probably on similar footing as to non-user.

be observed, confined to the case of a mine being excepted from a sale. They are also applied to the case of a mine being purchased.[1] In other words, they are applied not merely to non-user by a person who has once been in possession; but to non-possession by a person, who, with the right to take, has never actually taken, possession. And it is submitted that this is the law. And, if so, it is not necessary, that a mineral lessee, whom the Statute of Uses may not have clothed with possession, should make an actual entry within the period prescribed by the Limit. Acts, in order to preserve his rights against his lessor; the latter not having been himself in adverse possession. Indeed, if the law were otherwise, the lessor of a mine, whose lessee could not avail himself of the Statute of Uses, and was disentitled to work,[2] might, it would seem, without any default by the lessee, insist that upon the expiration of twelve years from the date of the lease, the right of possession had become, *ipso facto*, revested.[3] In *Keyse* v. *Powell*,[4] however, it seems to have been assumed, that a mineral lessee, who had never actually entered, and who could not avail himself of the Statute of Uses, had for all purposes, although without any adverse possession in another, a mere *interesse termini;* and was, accordingly, liable to be barred of his right after the lapse of the statutory period.

Statutory severance and non-user.

The principles, which apply where a mine is purchased or excepted, equally apply where it is severed from the surface under an Act of Parliament.[5]

Non-user as to customary right.

Mere non-user of a customary right to get stone from a quarry does not extinguish the right where the quarry has not been inclosed or fenced.[6]

Non-user as to surface privileges.

The doctrine of non-user as to mines applies in the same manner to surface privileges in connection with mines; if established by grant alone and without any aid from

[1] See *supra*. See also Seaman *v.* Vawdrey, 16 Ves. 392.

[2] See *ante*, p. 236.

[3] See and consider Low Moor Co. *v.* Stanley Coal Co., 33 L. T., N. S. 436, 34 *ib.* 186.

[4] 2 E. & B. 132.

[5] See Thew *v.* Wingate, 10 B. & S. 714, n., the facts of which are partly stated, *ante*, p. 80.

[6] Heath *v.* Deane, 1905, 2 Ch. 93: cf. Christian *v.* Gibson, 3 Moo. P. C. 351.

prescription. But it does not so apply where the privileges are obtained by prescription.[1]

Acquisition of title to surface when mines severed.

It need hardly be said, that, when the surface and the mines are in different hands, and a title to the surface is acquired under the Limit. Acts, the title to the mines remains unaffected. The question sometimes arises when the lord of a manor has parted with the mines under a waste, and a subsequent title to the surface is acquired by encroachment.

Prescript. Act.

A claim to a given substratum of coal lying under a close, not being a claim to a right of profit *à prendre*, but a claim to a part of the soil itself, cannot be sustained under the Prescription Act.[2]

Duchy of Cornwall minerals.

All claims of the Duke of Cornwall to mines or minerals in Cornwall are barred, where the land has been held and enjoyed adversely without interruption or disturbance for sixty years; and the mines and minerals have been substantially worked at any time during that period by the person in enjoyment; and have not at any time during that period been worked, or the tolls, dues, royalties, and other profits enjoyed, by the Duke or persons claiming under him.[3] And all such claims are equally barred, where the land has been held and enjoyed adversely without interruption or disturbance for 100 years; and the mines and minerals have not at any time during that period been worked, or the profits enjoyed, by the Duke or persons claiming under him.[4] But time does not begin to run as to reversions until they fall into possession;[5] nor as to hereditaments granted for limited estates until such estates fail.[6] And the bar does not extend to any mines or minerals determined to belong to the Duke by the award under the Act 7 & 8 Vict. c. 105.[7]

b.—STRANGERS—WRONGFUL ABSTRACTION—CIVIL REMEDIES.

(*a*) *Existence of Remedies—Person Liable.*

Generally.

If a stranger enters on another man's land, and works or

[1] The author has seen an opinion of Lord Selborne, when at the Bar (July 1st, 1861), so advising.

[2] Wilkinson *v.* Proud, 11 M. & W. 33: see s. 1 of the Act cited, *ante*, p. 125, n. [7].

[3] 7 & 8 Vict. c. 105, s. 73.

[4] S. 74.

[5] S. 76.

[6] S. 77.

[7] See s. 80; see *ante*, p. 71.

abstracts his minerals, whether by breaking bounds, or otherwise, the injured party is, *primâ facie*, entitled to a remedy. And to entitle a person to a remedy, it is not necessary that he should be *in esse* at the date of the wrongdoing. A contingent remainderman, upon coming into *esse*, may, for example, have a remedy in respect of previous wrongful workings.[1] And a person, who would otherwise be entitled to a remedy, is not the less entitled, because the wrongdoers are a railway company, who have entered upon minerals which have been reserved to him.[2] The company cannot in such a case say, that he has only been "injuriously affected" under section 6 of the Rail. Cl. Cons. Act, 1845 ;[3] and is only therefore entitled to the compensation recoverable thereunder.[4]

Abstraction without entry.

It is not, however, necessary in all cases that there should be an actual entry. If a stranger wrongfully removes support from another man's asphalt or pitch ; and thereby causes it to melt and slip on to his own land, and he then abstracts it ; the injured party has a remedy for the abstraction as well as for the removal of the support. It does not lie in the mouth of the stranger in such a case to say that the asphalt or pitch is like water, and that there is no property in it until it has been appropriated.[5] The position may, however, be different where there has not been any wrongful removal of support.[6]

Person liable.

The actual wrongdoer is not, of necessity, alone liable. A person who shares the profits of the wrongdoing ; as, for instance, an employer,[7] or a partner ;[8] may be also liable. And where third parties work mortgaged minerals under an authority given by the mortgagee, and the mortgagee has no power to

[1] Garth *v.* Cotton, 2 L. C. 970.

[2] It was suggested by Malins, V.-C., in Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 855, 856, that possibly, where it was *ultra vires* of a company, such as a railway company or a harbour company (see *ante*, p. 117), to work mines, no remedy could be had against them.

[3] See *ante*, p. 371.

[4] Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 25, 43. The House of Lords reversed the Court of Appeal, and restored the decision of Fry, J. : see 9 A. C. 480.

[5] Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 594 ; see also Salt Union, &c. *v.* Brunner, Mond, &c., 1906, 2 K. B., 831, 832 ; *ante*, pp. 495, 496. As to water, see *ante*, p. 494.

[6] See Salt Union, &c. *v.* Brunner, Mond, &c., *sup.* ; see *ante*, pp. 495, 496. Cf. English *v.* Metrop. Water Board, 1907, 1 K. B. 588, cited *ante*, p. 441.

[7] See Thomas *v.* Atherton, 10 Ch. D. 198 ; Joicey *v.* Dickinson, 45 L. T., N. S. 643.

[8] See Thomas *v.* Atherton, *sup.* 197.

give the authority, the third parties are liable to the mortgagor.[1] And persons may also be liable, who take part in the wrongdoing; although they do not share the profits.[2] And, of course, persons, under whose directions minerals are wrongfully removed, may be liable; although the act of getting and winning is done by another.[3] Where two or more persons are together guilty of the wrongdoing, each is answerable for the whole of the damage.[4]

Liability of mortgagee for acts of mortgagor.

A mortgagee cannot be made accountable for the acts of his mortgagor in possession, who is guilty of wrongfully abstracting the minerals of third parties.[5] And it makes no difference that the proceeds of the abstracted minerals are applied by the mortgagee in reduction of his debt; if he has no notice of the wrongful acts of the mortgagor.[6] It has, however, been intimated that, if, after a mortgagor has wrongfully abstracted minerals belonging to third parties, the mortgagee goes into possession; and, although without knowing that he is acting wrongfully, himself continues the abstraction; the onus may possibly lie upon him to show how much he himself abstracted, and how much his mortgagor abstracted.[7] And where a mortgagor abstracts minerals from the land of another; and sells them, and pays over the proceeds to the mortgagee; the mortgagee, if he has known of the abstraction, may be made liable.[8]

(β) *Trover—Trespass—Account, &c.*

Where injured party has right of property.

If the injured party has a right of property in the abstracted minerals, he may, in general, maintain an action of trover.[9] Or he may maintain trespass.[10] Or, if the minerals have been

[1] Hood *v.* Easton, 2 Giff. 692, 697, 698; 2 Jur., N. S. 917.

[2] Powell *v.* Aiken (4 K. & J. 343, 358) only decided, that the remedy was not available in equity before the Jud. Acts.

[3] See Powell *v.* Aiken, 4 K. & J. 343; see the form of the order at p. 359.

[4] See the forms of the decrees in Hood *v.* Easton, 2 Giff. 701; Phillips *v.* Homfray, 6 Ch. 774—776.

[5] Powell *v.* Aiken, *sup.*: cf. Brain *v.* Thomas, 50 L. J. Q. B. 662.

[6] Powell *v.* Aiken, *sup.*

[7] Powell *v.* Aiken, *sup.* 343, 353, 354: see the form of the order, 359, 360.

[8] Powell *v.* Aiken, *sup.* 349, 350: cf. Elias *v.* Griffith, 8 Ch. D. 521, 527, 528, 534.

[9] Attersoll *v.* Stevens, 1 Taunt. 183, 199, 201; Wood *v.* Morewood, 3 Q. B. 440, n.; Eardley *v.* Granville, 3 Ch. D. 826, 833.

[10] See Martin *v.* Porter, 5 M. & W. 351; Morgan *v.* Powell, 3 Q. B. 278; Wild *v.* Holt, 9 M. & W. 672; Clegg *v.*

sold, he may have an action for money had and received.[1] Or he may have an account.[2] Even before the Jud. Acts an account was usually [3] maintainable in equity; mining operations having always been regarded as a species of trade.[4]

Or is presumed to have it.

And even if his right of property rests on mere legal presumption, he is entitled to similar remedies. His position in this respect has been already considered.[5]

Where injured party has right of possession.

If the injured party has the right of possession; as, if he is a tenant for life or years impeachable of waste,[6] or a tenant from year to year,[7] or a tenant at will,[8] or a copyholder; [9] he may, in general, maintain trespass. Or he may have an account.[10]

Injury to reversioner.

And the benefit of a remedy may not be confined to the

Dearden, 12 Q. B. 576; Brain *v.* Harris, 10 Exch. 908; Dartmouth *v.* Spittle, 19 W. R. 444; Seddon *v.* Smith, 36 L. T., N. S. 168; Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 42—44.

[1] Powell *v.* Rees, 7 A. & E. 426; Phillips *v.* Homfray, 24 Ch. D. 454, 461; 1892, 1 Ch. 470. An action for use and occupation will not lie: Phillips *v.* Homfray, 1892, 1 Ch. 472.

[2] See Strode *v.* Little, 1 Vern. 58; Thomas *v.* Oakley, 18 Ves. 184; Thomas *v.* Jones, 1 Y. & C. C. C. 510, 526; Eads *v.* Williams, 4 De G. M. & G. 674, 693; Dean *v.* Thwaite, 21 Beav. 622; Hood *v.* Easton, 2 Giff. 692, 697, 698, 2 Jur. N. S. 917; Powell *v.* Aiken, 4 K. & J. 343; Hunt *v.* Peake, Joh. 705; Ernest *v.* Vivian, 33 L. J. Ch. 517; Ackroyd *v.* Briggs, 13 L. T., N. S. 521; Hilton *v.* Woods, 4 Eq. 432; Plant *v.* Stott, 21 L. T., N. S. 106; Llynvi Co. *v.* Brogden, 11 Eq. 188; Jegon *v.* Vivian, 6 Ch. 742; Phillips *v.* Homfray, *ib.* 770; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845; Ashton *v.* Stock, 6 *ib.* 719; Trotter *v.* Maclean, 13 *ib.* 574; Phillips *v.* Homfray, 24 *ib.* 439; 44 Ch. D. 694; 1892, 1 Ch. 465; Glyn *v.* Howell, 1909, 1 Ch. 666.

[3] It would have been refused, if the party seeking it did not show some privity with the other party, or some impediment to obtaining a legal remedy (Vice *v.* Thomas, Smirke's Rep.); or did not show possession (Sayer *v.* Pierce, 1 Ves. Sen. 232; Parrott *v.* Palmer, 3 M. & K. 645).

[4] See Story *v.* Windsor, 2 Atk. 630; Jefferys *v.* Smith, 1 J. & W. 203; Rose *v.* Nixon, 2 *ib.* 555; Williams *v.* Attenborough, T. & R. 73. See also *ante*, p. 95, n. [5], and other cases there cited.

[5] See *ante*, pp. 77 *et seq.*

[6] Keyse *v.* Powell, 2 E. & B. 132; Hollyman *v.* Noonan, 1 A. C. 595. See also Cox *v.* Glue, 5 C. B. 549. See *ante*, pp. 66, 67.

[7] Keyse *v.* Powell, *sup.*: see *ante*, p. 66.

[8] Low Moor Co. *v.* Stanley Coal Co., 34 L. T., N. S. 186: see *ante*, p. 66.

[9] Lewis *v.* Branthwaite, 2 B. & Ad. 437; Bowser *v.* Maclean, 2 De G. F. & J. 415; Eardley *v.* Granville, 3 Ch. D. 826, 833: see *ante*, pp. 67, 68.

[10] For the form of an order directing an account, see Bell *v.* Joell, Set. 575; Baynton *v.* Leonard, *ib.* 576. And for the form of an inquiry for ascertaining the value of minerals abstracted, see *ib.*; Hunt *v.* Peake, Joh. 713; Jegon *v.* Vivian, 6 Ch. 742, 762. The account may be taken by a referee: see Dean *v.* Thwaite, 21 Beav. 623, 624; Craven *v.* Kaye, Set. 577; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. 845, 867, 868; Joicey *v.* Dickinson, 45 L. T., N. S 643.

immediate owner or possessor. The reversioner on a lease has been held entitled to maintain case against a trespasser for digging coal in the lessee's land.[1]

Interest—generally.[2]

Interest is recoverable in actions of trover and trespass, under the express provisions of section 29 of the Act 3 & 4 Will. 4, c. 42. It is not recoverable in actions for money had and received, to which that section does not apply.[3] It is probably recoverable in actions for an account, under general equitable principles.[4]

(γ) *Measure of Damages.*

Different measures of damages.

Damages for the wrongful abstraction of minerals may be assessed according to the value of the minerals at the pit's mouth; without making any allowance for the expense of getting and severing, or of bringing to bank. Or they may be assessed according to the value when got and severed; allowing for the expense of bringing to bank, but not for the expense of getting and severing. Or they may be assessed with an allowance for the expense both of getting and severing, and also of bringing to bank.

Trover and trespass.

Where the remedy is sought in trover; and the plaintiff, before action brought, has demanded delivery of the severed chattel, and the demand has not been complied with; he is apparently entitled to recover the value of the chattel; without allowing for the expense either of getting and severing, or of bringing to bank.[5] Where, however, the remedy is sought in trespass, and no previous demand has been made, the plaintiff is entitled to recover the value; without allowing for the expense of getting and severing; but allowing for the expense

[1] Raine *v.* Alderson, 6 Scott, 691: cf. Harker *v.* Birkbeck, 3 Burr. 1560, n. As to trespasses in the Forest of Dean, see pp. 555, 556 of the 3rd edition of this book.

[2] As to interest under an inquiry as to damages, see *post*, p. 542.

[3] See Phillips *v.* Homfray, 44 Ch. D. 694, *per* Stirling, J. The Court of Appeal thought that the action in question was not an action for money had and received, but an equitable action for an account: see 1892, 1 Ch. 465.

[4] Phillips *v.* Homfray, 1892, 1 Ch. 465.

[5] Martin *v.* Porter, 5 M. & W. 352, *per* Parke, B.; Wood *v.* Morewood, 3 Q. B. 440, n., 441, n., *per* Parke, B.; Morgan *v.* Powell, 3 Q. B. 281, *per* Coleridge, J.; Livingstone *v.* Rawyards Coal Co., 5 A. C. 39, 40, *per* Lord Blackburn; Peruvian Guano Co. *v.* Dreyfus, 1892, A. C. 175, n., *per* Lord Macnaghten.

of bringing to bank.[1] And it has been laid down [2] that, where the defendant in trover has not been guilty of fraud or negligence, but honestly believed that he was acting within his rights, he ought to be allowed the expense of getting and severing, as well as of bringing to bank.[3]

Money had and received.

Where the remedy is in the shape of an action for money had and received, the money had and received appears to be recoverable, without making any allowances.[4]

Account—*bona fides.*

In an equitable action for an account the right of the defendant to an allowance has usually been held to depend upon whether he has acted *bonâ* or *malâ fide*. If he has acted, as it has been described, "fairly and honestly;" or "inadvertently;" or under a "mere mistake;" or under a "*bonâ fide* belief of title;" [5] or even in the *bonâ fide* expectation, that he was about to obtain a title, and the injured party has (or must be treated as having) known of the abstraction; [6] he has usually been allowed the expense both of getting and severing, and also of bringing to bank.[7] Indeed, in a case, where minerals A., consisting of an acre and a half only in extent, were surrounded on all sides by minerals B.; and it was believed by both the owner of A. and the lessees of B., that

[1] Martin *v.* Porter, 5 M. & W. 352, 354; Morgan *v.* Powell, 3 Q. B. 278; Wild *v.* Holt, 9 M. & W. 672; Hunter *v.* Gibbons, 1 H. & N. 466; Jegon *v.* Vivian, 6 Ch. 760; Peruvian Guano Co. *v.* Dreyfus, *sup.*; Dreyfus *v.* Peruvian Guano Co., 42 Ch. D. 76.

[2] Wood *v.* Morewood, 3 Q. B. 441, n. Wood *v.* Morewood was a Nisi Prius decision; but it received the express sanction of Lord Blackburn in Livingstone *v.* Rawyards Coal Co., 5 A. C. 40; Peruvian Guano Co. *v.* Dreyfus, *sup.*

[3] See also Wild *v.* Holt, 9 M. & W. 673; Hood *v.* Easton, 2 Giff. 699, 700; Jegon *v.* Vivian, 6 Ch. 761. Cf. Jones *v.* Gooday, 8 M. & W. 146.

[4] See Phillips *v.* Homfray, 1892, 1 Ch. 470, *per* Lindley, L. J.

[5] Hilton *v.* Woods, 4 Eq. 432, 440; Jegon *v.* Vivian, 6 Ch. 742, 760—762; United Merthyr Co., 15 Eq. 46; Job *v.* Potton, 20 Eq. 84, 97; Ashton *v.* Stock, 6 Ch. D. 719, 727; Brown *v.* Dibbs, 25 W. R. 776; Elias *v.* Griffith, 8 Ch. D. 529; Trotter *v.* Maclean, 13 Ch. D. 574, 586; Livingstone *v.* Rawyards Co., 5 A. C. 25, 34, 40; Joicey *v.* Dickinson, 45 L. T., N. S. 643; Tucker *v.* Linger, 21 Ch. D. 29 (affirmed 8 A. C. 508); Peruvian Guano Co. *v.* Dreyfus, 1892, A. C. 175, n.; Dreyfus *v.* Peruvian Guano Co., 42 Ch. D. 77. See also Hunter *v.* Gibbons, 1 H. & N. 466; Powell *v.* Aiken, 4 K. & J. 359.

[6] Trotter *v.* Maclean, 13 Ch. D. 574, 586. In this case one of four trustees had actual knowledge; and, it being his duty to impart it, knowledge was imputed to the others: see pp. 585, 588.

[7] For the form of the order, see Powell *v.* Aiken, 4 K. & J. 359, 360; Job *v.* Potton, 20 Eq. 99; Hilton *v.* Woods, Set. 578, 579; Jegon *v.* Vivian, 6 Ch. 762, Set. 578; Ashton *v.* Stock, Set. 579.

minerals A. were included in the lease of B.; and it was impossible for the owner of minerals A. to have worked them to a profit himself, or to have disposed of them except to the lessees of B.; and the lessees of B. worked out and disposed of A.; it was held, that the remedy of the owner of A. was confined to the value to him of minerals A. at the time they were taken; and that, in the circumstances, the best estimate of that value was a sum calculated at the rate of the royalty paid by the lessees of B. under their lease.[1] And, in another case, an honest wrongdoer was, on similar principles, in addition to the above-mentioned allowances, held entitled to an allowance for carrying to market.[2]

Account—no colour of right—negligence, &c.

If, on the other hand, the defendant in an action for an account has acted, as it has been described, "without any colour of title;" or "in a manner wholly unauthorised and unlawful;" or if his conduct has been "negligent" or "wilful;" he has usually been held not entitled to an allowance for getting and severing.[3] Thus, where the mortgagor of a mine worked into his neighbour's mine; and the mortgagees entered into possession, and continued the workings, but without knowing that they were wrongful; an inquiry was directed to ascertain the value at the pit's mouth of all the coal abstracted by the mortgagees; allowing them the expense of bringing to bank, but not of getting and severing.[4] So, where a mine was vested in trustees without power to lease it; and the owner of an adjoining mine commenced to work into the trustees' mine, in the *bonâ fide* belief that he was about to obtain a lease from them; and notice was subsequently given to the adjoining owner, that no lease could be granted; it was held, that, in respect of workings subsequent to the date of the notice, the

[1] Livingstone *v.* Rawyards Co., 5 A. C. 25. See also Peruvian Guano Co. *v.* Dreyfus, 1892, A. C. 175, n., 176, n.; Dreyfus *v.* Peruvian Guano Co., *sup.*; Eden *v.* N. E. R. Co., 1907, A. C. at p. 412: and cf. Taylor *v.* Mostyn, 33 Ch. D. 226, cited *post*, p. 540.

[2] Brown *v.* Dibbs, 25 W. R. 776.

[3] Powell *v.* Aiken, 4 K. & J. 343; Llynvi Co. *v.* Brogden, 11 Eq. 188; Phillips *v.* Homfray, 6 Ch. 770, 776, 780; 44 Ch. D. 701, 702; 1892, 1 Ch. 470; Job *v.* Potton, 20 Eq. 97; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 868; Thomas *v.* Atherton, 10 *ib.* 200, 202; Trotter *v.* Maclean, 13 *ib.* 574, 587; Joicey *v.* Dickinson, 45 L. T., N. S. 643; Tucker *v.* Linger, 21 Ch. D. 29 (affirmed 8 A. C. 508). For the form of the order, see Llynvi Co. *v.* Brogden, 11 Eq. 191, Set. 579; Phillips *v.* Homfray, 6 Ch. 775, 776.

[4] See Powell *v.* Aiken, 4 K. & J. 343. See the observations on this case in Llynvi Co. *v.* Brogden, 11 Eq. 191.

adjoining owner could only be allowed the expense of bringing to bank.[1] So where the lessees of a mine removed pillars in breach of a covenant to leave them; and the lessor could himself have worked them at the expiration of the lease, if they had been left; it was held, that the royalty payable under the lease was not the measure of the lessees' liability. They were held liable for the full value of the minerals removed; allowing the expense of bringing to bank, but disallowing the expense of getting and severing.[2]

Account—intentional fraud.

If the wrongdoer is guilty of intentional fraud, and his conduct amounts to larceny, his position, in an action for an account, is not more disadvantageous. No doubt there are cases apparently deciding, that, where the wrongdoer is guilty of larceny, he is disentitled not merely to an allowance for getting and severing, but to an allowance for bringing to bank.[3] And there are dicta in other cases, which are actually or apparently to the same effect.[4] But any decisions or dicta to that effect must now be treated as overruled.[5]

Equitable rules probably now applicable in all cases.

It is absurd that the measure of damages should to any extent depend upon the shape in which the remedy is capable of being, or is, pursued; and it is submitted that, at the present day, whether the plaintiff sues in trover, or trespass, or for money had and received, the equitable rules would be held exclusively applicable, and the measure of damages would be held to depend solely upon whether the defendant acted *bonâ fide* or *malâ fide*.[6]

Stranger working by authority of mortgagee.

Where the minerals in question formed part of a property in mortgage; and the mortgagee had no right to work them,

[1] Trotter *v.* Maclean, 13 Ch. D. 574.

[2] Taylor *v.* Mostyn, 33 Ch. D. 226: cf. Livingstone *v.* Rawyards Co., 5 A. C. 25, cited on preceding page. See further, as to Taylor *v.* Mostyn, *ante*, pp. 117, 257.

[3] See Plant *v.* Stott, 21 L. T., N. S. 106; where an account was directed of the "full market value" of the severed minerals. From the short form of the decree in Bell *v.* Joell, given in Seton (p. 575), all allowances would seem to have been there also excluded.

[4] See Hilton *v.* Woods, 4 Eq. 440, *per* Malins, V.-C.; Jegon *v.* Vivian, 6 Ch. 761, 762, *per* Lord Hatherley; United Merthyr Co., 15 Eq. 47, n.; Job *v.* Potton, 20 Eq. 91, 97, *per* Bacon, V.-C.; Livingstone *v.* Rawyards Coal Co., 5 A. C. 34, 39, *per* Lords Hatherley and Blackburn.

[5] See Trotter *v.* Maclean, 13 Ch. D. 586, *per* Fry, J.; Joicey *v.* Dickinson, 45 L. T., N. S. 643, *per* Baggallay, Lush, and Lindley, L. JJ. See also Bulli Coal Co. *v.* Osborne, 1899, A. C. 351.

[6] See and consider Peruvian Guano Co. *v.* Dreyfus, 1892, A. C. 175, n. 176, n., *per* Lord Macnaghten.

and was bound to account for their value without obtaining any allowances ;[1] a stranger professing to work under his authority was held to stand in the same position.[2] But the decision is of at least doubtful correctness.[3]

Date as at which value to be calculated.

The value of minerals wrongfully abstracted should be calculated as at the date of the abstraction.[4]

Consequential damage.

Where the wrongdoer might otherwise, in accounting, be entitled to allowances, he may possibly disentitle himself, if he has worked in such a manner as to seriously injure the rest of the plaintiff's mine.[5] And it is quite clear, that the wrongdoer may now be made directly liable for all consequential injury which may be caused ; whether by reason of subsidence ;[6] or by reason of the rest of the plaintiff's minerals being rendered unworkable, or useless ;[7] or otherwise.[8] So, if the result of the wrongdoer's conduct is to remove a barrier, and thereby render the plaintiff's mine liable to be invaded by water, the plaintiff may be entitled to additional damages for this indirect injury.[9] However, if, as the result of the wrongdoer's conduct, a barrier is removed, and compensation is recovered for the act of trespass, the wrongdoer's liability in respect of it is at an end. He cannot be made liable in respect of a subsequent influx of water through the aperture. For he incurs no obligations in consequence of his mere omission to close it up.[10]

[1] See, as to this highly punitive remedy in the case of a mortgagee, *ante*, pp. 115, 116.

[2] Hood *v.* Easton, 2 Giff. 692, 699–701.

[3] See S. C. on appeal, 2 Jur., N. S. 917, 918.

[4] See Livingstone *v.* Rawyards Co., 5 A. C. at 39, 40, *per* Lord Blackburn. See forms of orders in Seton at p. 579, and 15 Eq. 46.

[5] Powell *v.* Aiken, 4 K. & J. 343, *per* Wood, V.-C.

[6] See Hunt *v.* Peake, Joh. 705 ; Phillips *v.* Homfray, 6 Ch. 776, 781 ; Livingstone *v.* Rawyards Coal Co., 5 A. C. 25, 31 ; Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 594. As to the loss of remedy, see *post*, p. 549.

[7] See Jegon *v.* Vivian, 6 Ch. 742, 759, 762.

[8] See Nelson *v.* Bridges, 2 Beav. 244 ; Plant *v.* Stott, 21 L. T., N. S. 106. In Jegon *v.* Vivian, *sup.*, a general inquiry was directed as to the damages which the plaintiff had sustained by reason of the defendant's workings. For the form, see Set. 578. See also Bell *v.* Joell, Set. 575 ; Llynvi Co. *v.* Brogden, 11 Eq. 192, Set. 579 ; Phillips *v.* Homfray, 6 Ch. 776, 781 ; Williams *v.* Raggett, 25 W. R. 874, Set. 500. The law was laid down the other way in Powell *v.* Aiken, *sup.* (see p. 351) ; but this was before Lord Cairns' Act and the Judicature Acts.

[9] Plant *v.* Stott, *sup.* ; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 867, 868 ; Taylor *v.* Mostyn, 33 Ch. D. 226 : cf. Jegon *v.* Vivian, 6 Ch. 759 ; and see the first inquiry in the minutes, p. 762.

[10] Clegg *v.* Dearden, 12 Q. B. 576, See also *ante*, p. 512.

Unsaleability of minerals.

The mere circumstance, that the injured party could not have sold the severed minerals, but could only have consumed them upon the premises beneath which they lay, does not affect the measure of damages.[1] But it may be otherwise, if he could not have got them, or could only have got them at a ruinous expense.[2]

Trade allowances.

Under an order allowing "actual costs and expenses;" or "disbursements;" [3] or, it seems, "just allowances;" [4] profit or trade allowances will not be included.

Interest under inquiry as to damages.

Where an inquiry as to damages is directed, the date from which interest will run on the amount of such damages depends on the form of the order. If the order directs an inquiry and orders payment of the amount certified, it is within the provisions of section 18 of the Judgments Act, 1838,[5] and interest runs from the date of the order. If the order directs an inquiry and gives liberty to apply after the result has been certified, no obligation to pay and consequently no right to interest arises until a further order has been made.[6]

(δ) *Mode of Dealing with Proceeds.*

Tenant for life or years.

Where during the possession of a tenant for life or years, who is entitled to work minerals,[7] they are severed by a stranger, the damages recoverable against him [8] will belong absolutely to such tenant for life or years.[9] His right thereto cannot be affected by the circumstances, that he might not himself have worked the minerals during the period of his interest; and that, if he had not done so, they would have devolved as part of the inheritance upon the remainderman or reversioner.[10] Where during the possession of a tenant for life or years, who is not entitled to work minerals,[11] they are severed by a stranger, the damages recoverable against him [8] will be dealt with as follows:—If, at the time of the severance,

[1] Ashton *v.* Stock, 6 Ch. D. 719, 726.

[2] See Livingstone *v.* Rawyards Coal Co., 5 A. C. 25; *ante*, pp. 538, 539.

[3] United Merthyr Co., 15 Eq. 46.

[4] See p. 49.

[5] 1 & 2 Vict. c. 110.

[6] Ashover Fluor Spar Mines, Ltd. *v.* Jackson, 1911, 2 Ch. 355, 359. See, further, as to interest, *ante*, p. 537, and *post*, p. 549.

[7] See *ante*, pp. 84, 85, 94.

[8] *Ante*, pp. 535 *et seq.*

[9] See *Re* Barrington, 33 Ch. D. 527.

[10] See Attersoll *v.* Stevens, 1 Taunt. 183.

[11] See *ante*, pp. 87, 88, 90, 91.

there is not any person *in esse* entitled to an estate of inheritance in reversion or remainder in the mines or quarries, the proceeds, or the amount to be accounted for, will be invested and dealt with as part of the *corpus* of the estate.[1] And it seems, that during the possession of the tenant for life or years, the income will not be accumulated, but will be paid to him; he not having done anything to disentitle himself to receive it.[2] With this exception, the principles applicable to determine the mode of dealing with the amount recovered in respect of wrongful workings by a tenant for life or years [3] seem equally to apply where the severance is the act of a stranger.[4]

Copyholder.

It has been said, that, where copyhold minerals are severed by a stranger, the damages recoverable against him should be divided in equal shares between the lord and the copyholder.[5]

(ε) *Injunction—Receiver and Manager.*

Injunction.

The injured party may also, in general, have an injunction to restrain the future working or abstraction.[6] Prior to the Judicature Act, 1873, fine distinctions were, in cases of trespass, drawn between the right to restrain a person who was in possession, and a person who was not in possession; and between the right to restrain a person not in possession who was a mere trespasser, and a person not in possession who acted under a colour of right.[7] But there was usually [8] no

[1] See and consider Bewick *v.* Whitfield, 3 P. Wms. 267.

[2] See and consider Bagot *v.* Bagot, 32 Beav. 509, 519. The only reason in this and similar cases for refusing to allow the tenant for life or years to receive the income is that he is a wrongdoer. See also Bell *v.* Wilson, 1 Ch. 309.

[3] *Ante*, pp. 95—98.

[4] *Re* Barrington, 33 Ch. D. 527: consider Gresley *v.* Mousley, 3 De G. F. & J. 433, 445, 446; and see Garth *v.* Cotton, 2 L. C. 970.

[5] A.-G. *v.* Tomline, 15 Ch. D. 152, *per* Fry, J. But see S. C. at p. 154, *per* Jessel, M. R.

[6] Trinidad Asphalt Co. *v.* Ambard, 1899, A. C. 594.

[7] See Haigh *v.* Jaggar, 2 Coll. 231, 235; Stanford *v.* Hurlstone, 9 Ch. 116.

[8] It was refused in Haigh *v.* Jaggar, *sup.* But there the defendants had been working for a considerable time before the application was made: there was a question of title involved which the plaintiffs were proceeding simultaneously to determine at law (see Haigh *v.* Jaggar, 16 M. & W. 525, 3 Exch. 54; *ante*, p. 276); and it was not suggested that the defendants were working unskilfully, or that they were insolvent. It was also refused by Lord

difficulty in obtaining an injunction, where mines were being wrongfully worked, or minerals wrongfully abstracted ;[1] the consequences of refusing it being usually irreparable,[2] and mining operations being considered a species of trade.[3] And that Act expressly provides, that an injunction may be obtained, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise ; or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title ; and whether the estates claimed by both or by either of the parties are legal or equitable.[4] And it is not necessary for a plaintiff to wait until a trespass is actually committed. He may obtain an injunction upon a threat to commit it.[5]

Receiver and manager.

It may be proper, in a case of disputed title, instead of granting an injunction, to appoint a receiver and manager.[6]

(ζ) *Discovery.*

Inspection of property may usually be had.

A litigant, who has a *primâ facie* case, may usually obtain, on interlocutory application, an order, giving himself and his agents liberty at all reasonable times to inspect his neighbour's property, for the purpose of ascertaining whether his

Thurlow : see the case mentioned in Crockford *v.* Alexander, 15 Ves. 138. But afterwards he changed his opinion, and granted it : see the statements in Mitchell *v.* Dors, 6 Ves. 147 ; Smith *v.* Collyer, 8 *ib.* 90 ; Thomas *v.* Oakley, 18 *ib.* 186 ; Lowndes *v.* Bettle, *sup.* 454 ; and see Flamang's Case, 7 Ves. 308.

[1] Mitchell *v.* Dors, 6 Ves. 147 ; Flamang's Case, 7 *ib.* 308 ; Smith *v.* Collyer, 8 *ib.* 90 ; Grey *v.* Northumberland, 17 *ib.* 282 ; Norway *v.* Rowe, 19 *ib.* 147 ; Field *v.* Beaumont, 1 Swanst. 208 ; Jefferys *v.* Smith, 1 J. & W. 302 ; Parrott *v.* Palmer, 3 M. & K. 632 ; Thomas *v.* Jones, 1 Y. & C. C. C. 510, 526 ; Powell *v.* Aiken, 4 K. & J. 343 ; Hunt *v.* Peake, Joh. 705 ; Wilson *v.* Grey, 3 Eq. 121 ; Hilton *v.* Woods, 4 Eq. 432 ; Wright *v.* Pitt, 12 Eq. 417 ; Phillips *v.* Homfray, 6 Ch. 776 ; Ashton *v.* Stock, 6 Ch. D. 719, 725 ; cases of mines ; Cowper *v.* Baker, 17 Ves. 128 ; Thomas *v.* Oakley, 18 *ib.* 184 ; Ackroyd *v.* Briggs, 13 L. T., N. S. 521 ; cases of quarries or stones.

[2] See Flamang's Case, *sup.* ; Cowper *v.* Baker, *sup.* ; Thomas *v.* Oakley, *sup.*

[3] See Jefferys *v.* Smith, *sup.* ; see also *ante*, p. 95, n. [5], and other cases there cited.

[4] S. 25, sub-s. 8.

[5] See Gibson *v.* Smith, 2 Atk. 182 ; Wilson *v.* Grey, 3 Eq. 121. See Judicature Act, 1873, s. 25, sub-s. 8. For the form of the injunction, see Lonsdale *v.* Curwen, 3 Bligh, 168, n., 170, n. ; Walker *v.* Fletcher, *ib.* 172, n. ; Baynton *v.* Leonard, Set. 576 ; Powell *v.* Aiken, 4 K. & J. 360 ; Mansel *v.* Evans, Pemb. 1st ed. 263 ; Bell *v.* Joell, Set. 575 ; Craven *v.* Kaye, Set. 577.

[6] See Haigh *v.* Jaggar, 2 Coll. 231, 238, 239.

own mine has been encroached upon. And, as ancillary thereto, he may, in proper cases, obtain liberty to measure and dial; to make sections, plans, and surveys; to use the neighbour's shafts and machinery; to remove obstructions to the inspection; and, for the latter purpose, to break up the neighbour's soil. And the neighbour will be ordered to give all reasonable facilities in the way of ventilation and otherwise for effectuating those objects. Prior to the Judicature Acts, Courts of equity, by virtue of their original jurisdiction; [1] and Courts of law, under section 58 of the Com. Law Proc. Act, 1854; [2] were in the habit of making orders for those, or most [3] of those, purposes. And similar orders have been made under the Judicature rules.[4] Time will usually, if asked for, be given to answer the evidence of the applicant.[5] But a mere denial of the encroachment, without actual disproof, is usually immaterial; the right in question not depending on the balance of testimony, but on the circumstances that by its exercise the fact of the encroachment will be best ascertained.[6]

But terms will usually be imposed.

The applicant will, however, usually have to submit to the following, or most of the following, terms:—He will usually be obliged to give a reasonable notice in writing, stating the time at which he proposes that the inspection shall take place, and the names and descriptions of the persons whom he proposes as his agents for that purpose. He will not be allowed to appoint agents to whom his neighbour may reasonably object. He will not be allowed to inspect except for the purpose of ascertaining the fact of the encroachment. His

[1] See Kynaston *v.* East Ind. Co., 3 Swanst. 248, 262; East Ind. Co. *v.* Kynaston, 3 Bl. 153; Lonsdale *v.* Curwen, *ib.* 168, n., 171, n., Set. 577; Walker *v.* Fletcher, 3 Bl. 172, n.; Lewis *v.* Marsh, 8 Ha. 97; A.-G. *v.* Chambers, 12 Beav. 159, Set. 576; Bennitt *v.* Whitehouse, 28 Beav. 119, 122, 123, Set. 576; Ennor *v.* Barwell, 1 De G. F. & J. 529; Whaley *v.* Braucker, 10 Jur., N. S. 535; Phillips *v.* Homfray, 6 Ch. 776.

[2] 17 & 18 Vict. c. 125: see Bennett *v.* Griffiths, 3 E. & E. 467; Set. 576.

[3] Liberty to break up the neighbour's soil was not given before the Jud. rules: see Lumb *v.* Beaumont, 27 Ch. D. 356.

[4] See Cooper *v.* Ince Hall Co., W. N. 1876, p. 24; Lumb *v.* Beaumont, *sup.*

[5] See Whaley *v.* Braucker, *sup.*

[6] See Bennitt *v.* Whitehouse, 28 Beav. 119, 122, 123; Cooper *v.* Ince Hall Co., W. N. 1876, p. 24. See, however, Whaley *v.* Braucker, *sup.* 535, 536; where V.-C. Kindersley said he would not have made the order, if a plan had been produced, showing the state of the mine; and the neighbour had acknowledged its correctness, and submitted to an interlocutory injunction against encroaching.

neighbour will usually be allowed to attend the inspection. He will only be allowed to remove obstructions when the removal can take place without danger to life or health. He will not be allowed to do unnecessary damage to his neighbour's property or operations. He will usually have to make good all damage which his neighbour may sustain; and he may be obliged to give security that he will do so. And he will sometimes have to bear the costs of the inspection in any event.[1]

Inspection of title deeds.

A litigant may also, in a proper case, obtain inspection of his neighbour's lease for the purpose of seeing from the parcels and plan where his boundaries are.[2]

Discovery of title.

And where a defendant, while denying the plaintiff's title, sets up no title in himself, he may be required to state under what document or authority he claims the right to work.[3]

(η) *Loss of Remedy.*

Release.

It need hardly be said, that a release in respect of the wrongful abstraction of minerals is no defence to proceedings for an act of wrongful abstraction, of which the plaintiff was ignorant when he executed the release.[4]

Stat. of Limitations —generally.

If six years have elapsed since the wrongful abstraction was

[1] As to the removal of obstructions, see Walker *v.* Fletcher, 3 Bli. 178, n.; Ennor *v.* Barwell, 1 De G. F. & J. 530—532 (varying on appeal an order of V.-C. Stuart); Bennett *v.* Griffiths, 3 E. & E. 467, 470; Lumb *v.* Beaumont, 27 Ch. D. 356: as to giving security, see Bennett *v.* Griffiths, *sup.*: and, as to costs, see Mitchell *v.* Darley Main Colliery Co., 10 Q. B. D. 457 (which, for the purposes of appeal, are in the discretion of the Court, *ib.*). And, generally, as to the propositions in the text, and for forms of orders to inspect land, see the same cases; and also Lonsdale *v.* Curwen, 3 Bli. 168, n., 171, n., Set. 577; Lewis *v.* Marsh, 8 Ha. 100, Set. 577; A.-G. *v.* Chambers, 12 Beav. 160, Set. 576; Baynton *v.* Leonard, Set. 576; Bennitt *v.* Whitehouse, 28 Beav. 122, 123, Set. 576; Hilton *v.* Woods, Set. 578, 579; Mansel *v.* Evans, Pemb. 1st ed. 263; Cooper *v.* Ince Hall Co., W. N. 1876, p. 24; Wall *v.* Dunn, Set. 574. And for the form of an interlocutory order obliging the defendant to keep an account of the workings; and, in the event of the plaintiff succeeding, to furnish particulars of the royalty rendered to the lessor; and for liberty for the plaintiff, in the like event, to verify the accounts by inspection of the defendant's books; see Oakley *v.* Glan-y-Pwll Co., Set. 3rd ed. 903.

[2] Wayne's, &c., Co. *v.* Powell's, &c., Co., W. N. 1880, pp. 141, 159. See also *ante*, p. 529, n. [4].

[3] Cayley *v.* Sandycroft, &c., Co., 33 W. R. 577.

[4] Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845.

committed, and no steps have been taken in the meantime to obtain compensation, the injured party will, in general, be barred of his remedy by the Statute of Limitations.[1] And, although the Statute was enacted with reference to actions of trespass, strictly so called, it equally applies to proceedings in a Court of conscience in respect of a trespass.[2] In like manner, in the case of a continuing trespass, an account cannot, in general, be carried back further than six years.[3] And the right to plead the Statute is probably not affected by the circumstance, that the wrongdoer acted under the authority of a person who could not himself have pleaded it; as, for instance, a mortgagee.[4] With respect, however, to a continuing trespass, it has been decided, that, where the amount wrongfully abstracted has been proved, the onus lies on the wrongdoer to show what part of it was not taken within the six years.[5]

Concealed fraud.

However, an account will be carried back further than six years, if the injured party can show, that the abstraction was intentional; and that steps were taken to conceal either the fact of the abstraction,[6] or its extent.[7] No doubt in *Imperial, &c., Co.* v. *London, &c., Co.*[8] Martin, B., said: "It constantly happens that the owner of a coal mine takes coal from an adjoining mine, and by fraud prevents its being found out for more than six years, yet that is no answer to the Statute of Limitations." But this statement cannot be supported.[9]

[1] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Hunter *v.* Gibbons, 1 H. & N. 459; Hood *v.* Easton, 2 Jur., N. S. 917; Dawes *v.* Bagnall, 23 W. R. 690; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 857, 858. The statute in question is 21 Jac. I, c. 16, s. 3.

[2] See Trotter *v.* Maclean, 13 Ch. D. 574, 584; Gibbs *v.* Guild, 9 Q. B. D. 67; Bulli Coal Co. *v.* Osborne, 1899, A. C. 351.

[3] Dean *v.* Thwaite, 21 Beav. 621; Ashton *v.* Stock, 6 Ch. D. 719, 726; Trotter *v.* Maclean, *sup.*; Glyn *v.* Howell, 1909, 1 Ch. 666. See also Thomas *v.* Atherton, 10 Ch. D. 202.

[4] See Hood *v.* Easton, *sup.*; where, on appeal, the Lords Justices apparently disapproved the decision on this point of V.-C. Stuart, as reported, 2 Giff. 692. See, as to a mortgagee, *ante*, pp. 115, 116.

[5] Dean *v.* Thwaite, 21 Beav. 621; Trotter *v.* Maclean, 13 Ch. D. 574, 585.

[6] See Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 53; Dean *v.* Thwaite, *sup.* 623; Hunter *v.* Gibbons, 1 H. & N. 459; Dawes *v.* Bagnall, 23 W. R. 690; Trotter *v.* Maclean, *sup.* 584. See also Gibbs *v.* Guild, 8 Q. B. D. 296; 9 *ib.* 59.

[7] See Trotter *v.* Maclean, *sup.* 585. In Dawes *v.* Bagnall, *sup.*, an omission by the defendants to mark the illegal workings in their working plans was considered insufficient to constitute a case of concealed fraud.

[8] 10 Exch. 42, 43.

[9] Except perhaps in cases where the taking itself was innocent.

Fraud without any steps to conceal it.

In *Re Astley, &c., Co.* and *Tyldesley, &c., Co.*[1] a Divisional Court [2] decided, that, in order to avoid the application of the Statute, it was essential to show that the wrongdoer had been guilty, not merely of fraud, but of concealed fraud. This case adopted the views expressed in a long,[3] and (with one exception [4]) an unbroken, line of previous cases; and followed the analogous decisions as to concealed fraud under section 26 of the Act 3 & 4 Will. 4, c. 27.[5] However, in *Bulli Coal Co.* v. *Osborne*,[6] a case in the Privy Council, it was decided,[7] that the Statute had no application where coal had furtively for a series of years been taken by means of a wilful and secret underground trespass, and no laches was attributable to the injured party; and that it was immaterial, whether or not the wrongdoer took active steps to prevent detection. It is respectfully submitted, that the latter decision cannot be defended on legal grounds.[8] That it is a decision in accordance with natural justice cannot, however, be doubted. An abstraction of minerals differs widely from other trespasses. The injured party may frequently be ignorant, and nothing may happen to excite his suspicion, that his minerals are being abstracted.[9]

Mere unintentional abstraction.

In *Eccl. Comms.* v. *N. E. R. Co.*[10] it was decided by Malins, V.-C., that, if the injured party can show, that he could not have discovered the wrongful act earlier than a particular period, and that he did not neglect to use reasonable diligence,[11] the Statute will only begin to run from the date of such period. Although there is no fraud in fact, yet "for the purposes of the statute the breaking of bounds into a neighbour's colliery must be considered a fraudulent act." [12]

[1] 68 L. J. Q. B. 252.

[2] Bruce and Ridley, JJ.

[3] See the cases cited, *ante*, p. 548, n. [6].

[4] Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, *per* Malins, V.-C., of which the Divisional Court disapproved.

[5] It was held in the same case that a submission to arbitration did not *per se* exclude the right to plead the Statute.

[6] 1899, A. C. 351.

[7] *Per* Lords Macnaghten, Morris, and James of Hereford.

[8] Observations of Lord Hatherley in Livingstone *v.* Rawyards Coal Co. (5 A. C. 25, 34; *ante*, p. 539) were relied on; see 1899, A. C. 362. But it is not easy to see why; as his lordship was only dealing with the question of the measure of damages.

[9] See Dean *v.* Thwaite, 21 Beav. 622; Trotter *v.* Maclean, 13 Ch. D. 581.

[10] 4 Ch. D. 845, 858 *et seq.*

[11] See, as to this, Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Dean *v.* Thwaite, *sup.* 623; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 861, 862.

[12] Eccl. Comms. *v.* N. E. R. Co., *sup.* 860.

There is, however, no foundation for this proposition; and it must be treated as overruled.[1] "There is nothing in principle, or in authority, or in the exigencies of public policy, to require that the same measure of justice or injustice should be meted out to all transgressors alike, ignorant or wilful, innocent or fraudulent." [2]

Consequential injury—subsidence.

"It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues, he must sue for all his damage, past, present, and future, certain, and contingent." [3] And it has been already seen, that a trespasser is liable for the consequential injury caused by subsidence.[4] It follows, that, as regards subsidence, the position of a trespasser is more favourable than that of a subjacent or lateral owner, whose mere workings are not unlawful.[5] In the case of the latter, as has been already seen,[6] there is no cause of action until the subsidence ensues. The former is liable at once for the abstraction; and, in accordance with the rule above stated, he must also be liable at once for the possible injury from the future subsidence. The remedy, therefore, against him, in respect both of the subsidence, and the abstraction, must be sought within six years from the abstraction.

Running of statute, where wrongdoer demises mine, reserving rents in kind.

Where the wrongdoer has demised the mines in question, and has reserved rents by means of payment of produce in specie, the profits will be considered as accruing at the time of receiving the produce, and not at the time of its sale; and the statute will, therefore, run from the time of the receipt.[7]

Delay.

In an action for an account the probable right to interest [8] may be lost by delay. And where interest was not claimed at the trial, and the judgment was silent on the subject, it was held to be too late to claim it more than twenty years after the date of the judgment.[9] Mere delay may induce the Court to

[1] See Bulli Coal Co. *v.* Osborne, 1899, A. C. 351, 364. See also Astley, &c., Co. and Tyldesley, &c., Co., 68 L. J. Q. B. 252.

[2] Bulli Coal Co. *v.* Osborne, *sup.* 364.

[3] Darley Main Colliery Co. *v.* Mitchell, 11 A. C. 144, *per* Lord Bramwell; see also 132, *per* Lord Halsbury; 149, *per* Lord Fitzgerald. See further as to this case, *ante*, pp. 294–296.

[4] *Ante*, p. 541.

[5] See *ante*, p. 290.

[6] *Ante*, p. 294.

[7] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42.

[8] See *ante*, p. 537.

[9] Phillips *v.* Homfray, 44 Ch. D. 694; 1892, 1 Ch. 465.

withhold an interlocutory injunction to restrain the alleged wrongful working of a mine; especially after expenditure has been incurred; regard being had to the serious injury which might otherwise be caused.[1]

Death of wrongdoer.

The death of the wrongdoer may be a bar to the remedy; having regard to the maxim, *actio personalis moritur cum personâ*. On this ground, independently of the Act 3 & 4 Will. 4, c. 42, an action of trover, laying a conversion by the deceased; or an action of trespass; will not lie against an executor or administrator.[2] Where, however, the abstraction has taken place within six months before the death, an action of trespass or trespass on the case may be brought under section 2 of the Act.[3] But, under the same section, the action must be brought within six months after the executor or administrator undertakes the administration. However, where the deceased has wrongfully abstracted minerals, and sold them and received the proceeds, an action for money had and received has always lain against his executor or administrator.[4] And an action for an account has also always so lain. For a wrongful abstraction of minerals is not a mere personal tort. It is an act by which the estate of the wrongdoer is actually increased.[5]

c.—WRONGFUL ABSTRACTION—CRIMINAL REMEDIES.

Statutory provisions.

"Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal from any mine, bed or vein thereof respectively, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."[6] And "whosoever, being employed in or about any mine, shall take,

[1] Field *v.* Beaumont, 1 Swanst. 208. See also *ante*, p. 95, n. [5], and other cases there cited.

[2] Phillips *v.* Homfray, 24 Ch. D. 439; 44 Ch. D. 694; 1892, 1 Ch. 465.

[3] See Powell *v.* Rees, 7 A. & E. 426.

[4] Powell *v.* Rees, *sup.*; Phillips *v.* Homfray, *sup.*: cf. the law, when the act of the wrongdoer is a mere personal tort, *ante*, p. 488.

[5] Winchester *v.* Knight, 1 P. Wms. 407; Thomas *v.* Oakley, 18 Ves. 186; Powell *v.* Aiken, 4 K. & J. 352; Phillips *v.* Homfray, 6 Ch. 770; 24 Ch. D. 444, 446, 454, 455, 463, 464, 476 (the first inquiry). As to the other inquiries in the latter case, see *ante*, pp. 450, 488.

[6] 24 & 25 Vict. c. 96, s. 38.

remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony ; and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour." [1]

Decisions thereon.

An indictment, that the defendants being persons employed in a mine, in the parish of, &c., in the county of Cornwall, did steal ore, the property of the adventurers in the said mine, then and there being found, does not sufficiently show that the ore was stolen from the mine.[2] Where a prisoner was indicted in one count for stealing from the mine of a particular owner, and in the same count for stealing from the mines of thirty other owners coal the property of each of such other owners ; and it appeared, that all the coal in question had been raised at one shaft ; it was held :—(1) that the prosecutor could not be called on to elect on which charge he would go to the jury ; (2) that, although the Judge might direct the jury to confine their attention to one particular charge, yet the prosecutor was entitled to give evidence in support of all the charges ; and (3) that proof of such charges might be relied on to show a felonious intent.[3]

d.—MALICIOUS INJURIES.

(*a*) *Drowning Mines.*

Statutory provision.

"Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby

[1] S. 39. Before the passing of this Act it was held, that miners, employed to bring ore to the surface, and paid by the owners according to the quantity produced, who removed from the heaps of other miners ore produced by them, and added it to their own, in order to increase their wages ; the ore still remaining in the possession of the owners ; were not guilty of larceny : R. *v.* Webb, 1 M. C. C. 431. Under the Act 39 & 40 Geo. 3, c. 77, persons, who wall or stack coal, ironstone or iron ore, in a fraudulent manner, and to deceive their employers ; or who remove ironstone or iron ore, to defraud the persons who raise it ; may be convicted before the justices, and committed for any time not exceeding three months : s. 4. But prosecutions must be begun within nine months : s. 9.

[2] R. *v.* Trevenner, 2 M. & Rob. 476.

[3] R. *v.* Bleasdale, 2 C. & K. 765.

to destroy or damage such mine, or to hinder or delay the working thereof, . . . shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any period not exceeding seven years, and not less than three [1] years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: Provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working." [2]

Decision thereon.

The mine may in an indictment be laid as the property of a person in possession of and working it, although only as an agent for others.[3]

(β) *Setting Fire to Mines.*

Statutory provisions.

"Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three [1] years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping." [4] And "whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen, and not less than three,[1] years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping." [5]

[1] Altered to five by 27 & 28 Vict. c. 47, s. 2.

[2] 24 & 25 Vict. c. 97, s. 28.

[3] R. *v.* Jones, 1 C. & K. 181; S. C. 2 M. C. C. 295.

[4] 24 & 25 Vict. c. 97, s. 26.

[5] 24 & 25 Vict. c. 97, s. 27.

(γ) *Injuring Airways, Waterways, Shafts, &c.*

Statutory provision.

Whosoever shall, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, "unlawfully and maliciously pull down, fill up or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level or shaft of or belonging to any mine, shall be guilty of felony;" and shall be liable, on conviction, to the same punishment as that provided for the drowning of a mine.[1] But "this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working."[2]

Decisions thereon.

Where one of two owners of adjoining mines, asserting that a certain airway belonged to him, directed his workmen to stop it up; and the workmen, acting *bonâ fide*, did so; they were acquitted, although their master knew that he had no right to the airway. But they would have been guilty, if they had known that the stopping up was a malicious act of their master.[3] The provision in question is intended to render a person criminally liable who acts with a wicked mind. It is not intended to apply to the *bonâ fide* exercise of a supposed right.[4]

(δ) *Injury to Machinery and Effects.*

Generally—statutory provision.

"Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam-engine or other engine for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating or working, any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk, for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way or trunk be completed or in an unfinished state; or shall unlawfully and

[1] 24 & 25 Vict. c. 97, s. 28; *ante*, pp. 551, 552.

[2] *Ib.*

[3] R. *v.* James, 8 C. & P. 131: see James *v.* Phelps, 3 Per. & D. 231.

[4] R. *v.* Matthias and Twigg, 14 Cox, C. C. 5.

maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof; or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever in anywise belonging or appertaining to, or connected with, or employed in any mine, or the working or business thereof; shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven, and not less than three [1] years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping." [2]

Decisions thereon.

Where a steam-engine used in working a mine had been stopped, and locked up for the night; and the prisoner got into the engine house and set it going; and the engine received an injury; it was held, that this was a damaging of the engine.[3] A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, is an "erection used in conducting the business" of a mine.[4] And where mine owners constructed a wooden trough, by means of which water was conveyed from a spring to a pool half a mile distant from their mine, being as near as the nature of the ground admitted; and the water so brought was used for the purpose of washing the ore obtained from the mine: it was held, that the trough was an "erection." [5]

Rioters—statutory provisions.

"If any persons, riotously and tumultuously assembled

[1] Altered to five by 27 & 28 Vict. c. 47, s. 2.

[2] 24 & 25 Vict. c. 97, s. 29. Previously to 24 & 25 Vict. c. 97, it was held, that, where a mine was worked by a steam-engine, which caused a cylinder to revolve, and take up the rope as the coal was drawn up; and the cylinder was damaged; proof of such damage would not support an indictment charging the damaging of the steam-engine: see R. *v.* Whittingham, 9 C. & P. 234.

[3] R. *v.* Norris, 9 C. & P. 241.

[4] R. *v.* Whittingham, *ib.* 234.

[5] Barwell *v.* Winterstoke, 14 Q. B. 704.

together to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down or destroy . . . any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk, for conveying minerals from any mine every such offender shall be guilty of felony; and, being convicted thereof, shall be liable to be kept in penal servitude for life, or for any term not less than three [1] years." [2] And, "if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such . . . engine, staith, bridge, waggon-way, or trunk . . . every such offender shall be guilty of a misdemeanour; and, being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years, and not less than three [1] years; or to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if, upon the trial of any person for any felony in the last preceding section mentioned,[3] the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly." [4] The Riot (Damages) Act, 1886,[5] also applies "in the case of the injury or destruction by persons, riotously and tumultuously assembled together, . . . of any steam-engine or other engine for sinking, draining or working any mine or quarry, or of any staith or erection used in conducting the business of any mine or quarry, or of any bridge, waggon-way or trunk for conveying minerals or other product from any mine or quarry." [6]

[1] 24 & 25 Vict. c. 97, s. 11.

[2] Altered to five by 27 & 28 Vict. c. 47, s. 2.

[3] S. 11, *sup.*

[4] 24 & 25 Vict. c. 97, s. 12. See, as to Scotland, 56 Geo. 3, c. 125; Ireland, 5 & 6 Vict. c. 28, s. 5.

[5] 49 & 50 Vict. c. 38.

[6] S. 6 (b).

CHAPTER XX.

TAXES, DUTIES, RATES, AND TITHES—PAUPER SETTLEMENTS.

a.—LAND TAX.

Land tax.

ALL quarries, mines of coal, tin, lead, copper, mundic, iron and other mines, iron mills, furnaces, and other iron works, salt works, and alum mines and works, are, under the Act 38 Geo. 3, c. 5, subject to Land tax.[1] And, although in strictness mines or quarries cannot, it would seem, be properly so called until they are opened,[2] the Act probably applies to them, although they may not have been opened when it was passed. They are nothing more than land and the potential profit of land in existence at the time the Act was passed.[3]

b.—INCOME TAX.

(*a*) *Property Liable—Chargeable Value.*

5 & 6 Vict. c. 35, Sch. A.

Independently of section 8 of the Act, 29 & 30 Vict. c. 36, mines and quarries are assessable to the income tax under Schedule A. of the Act, 5 & 6 Vict. c. 35. Under No. III. of that schedule "quarries of stone, slate, limestone, and chalk," are assessable on the amount of profits in the preceding year. Under the same number "mines of coal, tin, lead, copper, mundic, iron, and other mines," are assessable on the full amount for one year, or on an average of the five preceding years. But, if any "mine" has, from some unavoidable cause, been decreased and is decreasing in annual value, so that the average of five years will not give a fair estimate of the annual value, the annual value may, under No. IV. of that schedule, be computed on the actual amount of profits in the preceding

[1] See s. 4.

[2] See *ante*, p. 2.

[3] See Colchester *v.* Kewney, L. R. 2 Exch. 257, 258; Newton Chambers & Co. *v.* Hall, 1907, 2 K. B. at pp. 454, 455: cf. R. *v.* Randall, 4 E. & B. 564, 569. For the construction of contracts to redeem land tax, see *ante*, p. 53.

year, subject to the usual abatement on account of diminution of duty in the current year. And if any "mine" shall have wholly failed, the assessment may, under the same number, be wholly discharged.[1] Under No. III. of that schedule, "iron works, salt works, and alum mines or works, water works, &c., railways, &c., and other concerns of the like nature from or arising out of any lands, tenements, &c.," are assessable on the profits of the year preceding. And, generally, all lands, tenements, or hereditaments capable of actual occupation, and not coming within the foregoing specific principles, are, under No. I. of that schedule, assessable according to their annual value.

Slate mines —brickfields.

As the Act distinguishes between "quarries of slate" and "mines," and applies to each a different principle of assessment, works for the getting of slate are assessable as "quarries," and not as "mines;" although the slate be obtained by underground working.[2] Brickfields are either within the principle applicable to iron works, salt works, and alum works; or within the general principle.[3]

29 & 30 Vict. c. 36, s. 8.

Section 8 of the Act, 29 & 30 Vict. c. 36, enacts that "the several and respective concerns described in No. III. of Schedule A." of the Act, 5 & 6 Vict. c. 35, shall be assessed "in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule D. of the said Act, so far as such rules are consistent with the said No. III.;" with a special proviso as to railways. And Schedule D., which provides for the assessment in respect of any "trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule," requires the assessment to be made on a sum not less than the full amount of the balance of the profits or gains "upon a fair and just average of three years."

Effect of this provision.

Section 8 of the Act, 29 & 30 Vict. c. 36, appears to have abolished No. IV. of Schedule A. of the Act, 5 & 6 Vict. c. 35, and to have substituted the rules in Schedule D.[4] As to its

[1] "Fifth rule, No. III.," mentioned in No. IV. r. 5, is an obvious mistake for "second rule, No. III."

[2] Jones *v.* Cwmorthen Slate Co., 4 Exch. D. 97, 5 *ib.* 93. For the difference between a mine and a quarry, see *ante*, pp. 4 *et seq.*

[3] Edmonds *v.* Eastwood, 2 H. & N. 811.

[4] See Ryhope, &c., Co. *v.* Foyer, 7 Q. B. D. 500, *per* Lindley, J.; Coltness, &c., Co. *v.* Black, 6 A. C. 337, *per* Lord Blackburn.

effect in other respects there is considerable doubt. It was laid down in *Knowles* v. *McAdam*,[1] that it makes the three-year period applicable to such cases as that of a colliery company, formed for the purpose of carrying on the business of working coal mines. And it was laid down in *Ryhope, &c., Co.* v. *Foyer*,[2] that it makes that period applicable to all cases of mines. *Knowles* v. *McAdam* was, however, expressly dissented from in *Coltness, &c., Co.* v. *Black*;[3] a case before the House of Lords. And, if the principle which *Knowles* v. *McAdam* and *Ryhope, &c., Co.* v. *Foyer* laid down be correct, not merely would "mines" be reduced from a five-year to a three-year period, but "quarries," which, probably owing to their comparative freedom from fluctuation in value, were originally placed in a single-year period, would be raised from that period to a three-year period.[4] It is hard to find any solid reason why these changes should be made. It is suggested, especially having regard to its proviso as to railways, that by section 8 of the Act, 29 & 30 Vict. c. 36, it was intended to change to the three-year period those only of the concerns mentioned in No. III. of Schedule A. of the Act, 5 & 6 Vict. c. 35, which consist of "iron works, salt springs or works, alum mines or works, water works, &c., railways, &c., and other concerns of the like nature."

Ryhope, &c., Co. *v.* Foyer.

If the three-year period is now applicable to a colliery company, and the company has acquired the rights and liabilities of a previous company, it has not, under the rules of Schedule D., "been set up and commenced" within that period; so as to entitle it to have the computation made on the average of the balance from the date of the first "setting up."[5] Nor (independently of whether No. IV. of Schedule A. is not now abolished[6]), is such a company entitled, under that number, to have its profits estimated in proportion to the profits received since the commencement of its "possession or interest;" on the ground that, by reason of its possession or interest having

[1] 3 Exch. D. 23, *per* Kelly, C. B., and Cleasby and Pollock, BB.

[2] 7 Q. B. D. 485, *per* Grove and Lindley, JJ.

[3] 6 A. C. 337—339, *per* Lord Blackburn.

[4] See Coltness, &c., Co. *v.* Black, 6 A. C. 338, *per* Lord Blackburn. Cleasby, B., in Knowles *v.* McAdam (3 Exch. D. 30) refused to admit this consequence.

[5] See Ryhope, &c., Co. *v.* Foyer, 7 Q. B. D. 485.

[6] See preceding page.

commenced within the three-year period, it cannot make out the statutory account.[1] It has, on the contrary, under the rules of Schedule D., "succeeded to" the previous company; so as to retain the position which it would have held, if it had been identical therewith.[2] It may, however, under those rules, prove that its profits and gains have fallen short from some "specific cause;" so as to entitle it to have the computation made "on the amount of the full value of the profits and gains received annually;" or, in other words, on the gains for the current year. And an extraordinary depression in the coal trade may not improperly be called a "specific cause."[3]

Profits and gains—realised property.

The tax, as might be expected from its title, is essentially a tax upon profits and gains. Where, for example, a principal debt is made repayable by periodical instalments, none of the instalments are chargeable.[4] And where the purchase-money of an estate is made payable by periodical instalments, although each instalment may in substance be partially compounded of interest, it is not within the purview of the Acts.[5] Consistently, however, with this, the tax is a tax upon property. It assumes the ownership of a mine or quarry; disregards the amount it may have cost, either in the way of purchase or of rent; proceeds to describe the method of calculating its "annual value;" and declares, that this shall be the average "profit received therefrom."[6] A mine owner, as distinguished from a merchant or trader, is, in fact, in every case taxed in respect of his mine as a fixed and realised "property," which belongs to him, and from which he reaps an annual benefit. And the statutory words, "annual value," or "profit received," are used not as the subject of taxation; but only as the measure of the taxation to which the "property" is subject.[7]

Allowances.

It follows that deductions are not allowable in respect of capital, merely because it is exhausted or consumed in making the profit.[8] They are not, for example, necessarily allowable

[1] See Ryhope, &c., Co. *v.* Foyer, *sup.*
[2] *Ib.*
[3] *Ib.*
[4] Foley *v.* Fletcher, 3 H. & N. 779, 784.
[5] *Ib.* p. 769.
[6] Coltness Co. *v.* Black, 6 A. C. 326, *per* Lord Penzance.
[7] *Ib.* p. 327, *per* Lord Penzance.
[8] Addie *v.* Inland Revenue, cited in Forder *v.* Handyside, 1 Exch. D. 233; Coltness Co. *v.* Black, 6 A. C. 315. The latter case overruled Knowles *v.* McAdam, 3 Exch. D. 23. See also Alianza Co. *v.* Bell, 1906, A. C. 18; affirming S. C. 1904, 2 K. B. 666, 1905, 1 K. B. 184.

for amounts expended in sinking a pit; which may constitute a permanent addition to capital.[1] Nor, for similar reasons, are they allowable for the year's depreciation of all the pits in a mine, whenever sunk.[2] And whether the mine is situated at home, or abroad, is for this purpose immaterial.[3] Nor are deductions allowable in respect of capital, which is withdrawn,[4] or which suffers diminution.[5] Nor are deductions allowable in respect of subscriptions to an association which indemnified its subscribers against losses occasioned by strikes.[6] However it may be, that in some cases a mine owner is entitled to an allowance in respect of the cost of sinking a pit, if that pit be exhausted by the workings of the year in which it is sunk.[7] And deductions are always allowable for depreciation of machinery or plant.[8]

(β) *Person Liable.*

Generally. In the cases subject to the specific principles prescribed by the Act, 5 & 6 Vict. c. 35,[9] the duty is, under No. III. of Schedule A., chargeable on the person, corporation, company, or society, carrying on the concern; or on their agents, treasurers, or other officers; on the amount of the produce or value; and before paying, rendering, or distributing the same either between the different persons or members, or to the owner of the soil or property, or to any creditor or other claimant. And all such persons, companies, or societies are bound to allow out of such produce or value a proportionate deduction of the duty. And, in respect of any mine carried on by a company of adventurers, the duty is, under the same number, chargeable on the company jointly. But any adventurer may claim to be charged separately; in order to set off his loss in one concern against his profits in another.

Retainer. Every person, who is liable to the payment of any rent,

[1] Addie *v.* Inland Revenue, *sup.*
[2] Coltness Co. *v.* Black, *sup.*
[3] Alianza Co. *v.* Bell, *sup.*
[4] See Sch. D. of 5 & 6 Vict. c. 35.
[5] 5 & 6 Vict. c. 35, s. 159.
[6] Rhymney, &c., Co. *v.* Fowler, 1896, 2 Q. B. 79.
[7] See Coltness Co. *v.* Black, 6 A. C. 324, *per* Lord Cairns; 339, *per* Lord Blackburn: see, however, 326, *per* Lord Penzance.
[8] See 41 & 42 Vict. c. 15, s. 12. See, before the Act, Addie *v.* Inland Revenue, *sup.*; Forder *v.* Handyside, *sup.* Cf., as to allowances in the case of rating, *post*, p. 578.
[9] See *ante*, pp. 556, 557.

or any yearly interest of money, or any annuity or other annual payment; whether payable half-yearly, or at shorter or more distant periods; may, on making the payment, deduct and retain the amount of the duty according to the rate.[1] Accordingly, where, on the lease of a brickfield, there was a reservation for "royalty or brick rent the yearly sum of 100*l.*," and for every thousand bricks to be made in any year over and above the first million "an additional royalty or brick rent of 2*s.*," it was held that the lessee was entitled to deduct and retain thereout the amount of the duty.[2] Of course, however, the person claiming the right to deduct must show in the first instance a liability to the charge. Where, for instance, on the lease or sale of a mine, the consideration is a fixed sum payable by periodical instalments, as none of the instalments are in fact chargeable,[3] they are not sums out of which the duty may be deducted.[4]

(γ) *Place of Liability.*

Place of liability.

Under No. IV. of Schedule A. of the Act, 5 & 6 Vict. c. 35, "mines of coal, tin, lead, copper, mundic, iron, and other mines," are chargeable in the place where they are situate, or where their produce is manufactured.

(δ) *Appeals.*

Appeals.

Persons assessed for mines or quarries may, if they think proper, appeal against such assessment to the commissioners for special purposes instead of to the commissioners for general purposes.[5]

c.—ESTATE DUTY.

Estate duty.

Mines, like all other property passing on the death of a person dying after August 1st, 1894, are subject to estate

[1] 5 & 6 Vict. c. 35, s. 102; 16 & 17 Vict. c. 34, s. 40; Sch. D.

[2] Edmonds *v.* Eastwood, 2 H. & N. 811.

[3] *Ante*, p. 559.

[4] Taylor *v.* Evans, 1 H. & N. 101; Foley *v.* Fletcher, 3 *ib.* 769.

[5] 23 & 24 Vict. c. 14, s. 7. The Finance Act, 1901, imposed an export duty on coal: s. 3 (1); and for the purposes of the Act "coal" included culm, coke, and cinders: s. 3 (5). It also provided for the incidence of the duty as between landlord and tenant: s. 3 (6). The Finance Act, 1906, however, repealed the Act of 1901 as from November 1st, 1906.

duty.[1] And, for the purposes of such duty, the principal value of all property is the price, which, in the opinion of the Commissioners of Inland Revenue, such property would fetch, if sold in the open market at the time of the death of the deceased.[2]

d.—SUCCESSION DUTY.

Succession duty.

The principal value of real property for the purpose of succession duty is, in the case of a person dying after August 1st, 1894, ascertainable in like manner as for the purposes of estate duty.[3]

e.—DUTIES ON LAND VALUES.

Meanings of "land" and "minerals."

The Finance (1909—10) Act, 1910, contains a large number of provisions which apply to mines, quarries and minerals; either as being included in the general word "land," or under the specific description of "minerals." It has been already seen that the word "land," *primâ facie*, includes mines and quarries.[4] The meaning of the word "minerals" has been also already stated.[5]

Increment value duty—reversion

The provisions of the Act as to increment value duty apply

[1] Finance Act, 1894, ss. 1, 22 (f).

[2] *Ib.* s. 7 (5).

[3] *Ib.* s. 18 (2). Under the Succ. Duty Act the yearly value of an open (as to open and new mines, see *ante*, pp. 55 *et seq.*) mine was ascertainable upon the average profits or income, after deducting all necessary outgoings, during such a number of preceding years as might be agreed upon between the Commissioners and the successor. And if no agreement was come to, the principal value was required to be ascertained; and the annual value was then considered to be equal to interest at 3*l.* per cent. per annum on the amount of such principal (s. 26). It is probable that new mines had an annual value within the meaning of the Succ. Duty Act. Although they neither yield, nor are capable in their existing state of yielding, any annual income, yet they are saleable, and would fetch considerable sums in the market. See A.-G. *v.* Sefton, 11 H. L. C. 257, 268, *per* Lord Westbury. "Unopened mines" at p. 268 is no doubt a misprint for "opened mines." Lord Chelmsford seems to have inclined to the same view (see p. 279). But Lord Wensleydale refused to express an opinion upon the point (see p. 273). See the question asked by Lord Wensleydale at p. 263. The House of Lords affirmed A.-G. *v.* Sefton, 2 H. & C. 362; in which the majority of the Court were of opinion, that unopened mines were not within the Act. Property, which is increased in value by the discovery of minerals therein, the previous existence of which was unknown, was not within the contemplation of the Succ. Duty Act. See A.-G. *v.* Sefton, 11 H. L. C. 271, *per* Lord Wensleydale. See the question asked by Lord Westbury at p. 262.

[4] *Ante*, pp. 52, 53.

[5] *Ante*, pp. 16, 17, 22, 23.

to mines and quarries, as being included in the general word, "land," [1] but subject to certain specified modifications.[2] The provisions as to reversion duty [3] do not apply to mines or quarries.[4] And for the purposes of undeveloped land duty under the Act, undeveloped land does not include the minerals.[5] duty—undeveloped land duty.

The provisions of the Act as to mineral rights duty, and the application to minerals of the other statutory duties, are principally contained in sections 20 to 24 inclusive. These sections are complicated ; and it will be convenient to set them out *in extenso ;* with such notes [6] as, in the absence of decisions, seem appropriate. Mineral rights duty and other provisions as to minerals.

Mineral Rights Duty and Provisions as to Minerals.

20.—(1) There shall be charged, levied, and paid for the financial year [7] ending the thirty-first day of March nineteen hundred and ten [8] and every subsequent financial year [7] on the rental value [9] of all rights to work minerals and of all mineral wayleaves,[10] a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value. Mineral rights duty.

(2) The rental value shall be taken to be—

(*a*) Where the right to work the minerals is the subject of a mining lease,[11] the amount of rent [12] paid by the working lessee [13] in the last working year [14] in respect of that right ; and

(*b*) Where minerals are being worked [15] by the proprietor [16] thereof, the amount which is determined by the Commissioners to be the sum which would have been received as rent [12] by the proprietor [16] in the last working year [14] if the right to work the minerals

[1] Ss. 1, etc.

[2] S. 22.

[3] See s. 13 (1).

[4] S. 22 (1).

[5] S. 16 (4).

[6] For fuller information, see Harman on the Finance Acts, and Konstam on Land Values.

[7] "Financial year" is defined by s. 22 of the Interpretation Act, 1889, to mean "the 12 months ending the 31st day of March."

[8] See *post*, p. 565, n. [6].

[9] See sub-clause (2) of this section.

[10] See s. 24, *post*, p. 569.

[11] See *ib.*

[12] See *ib.*

[13] See *ib.*

[14] See *ib.*

[15] See the 1st, 2nd, and 3rd of the four final provisions of s. 24, *post*, p. 571.

[16] See s. 24, *post*, p. 569.

had been leased to a working lessee [1] for a term and at a rent and on conditions customary in the district,[2] and the minerals had been worked to the same extent and in the same manner as they have been worked by the proprietor [3] in that year:

Provided that the Commissioners shall cause a copy of their valuation of such rent [4] to be served on the proprietor; [3] and

(*c*) In the case of a mineral wayleave,[5] the amount of rent [4] paid by the working lessee [1] in the last working year [6] in respect of the wayleave:

Provided that if in any special case it is shown to the Commissioners that the rent [4] paid by a working lessee [1] exceeds the rent customary in the district,[2] and partly represents a return for expenditure on the part of any proprietor [3] of the minerals which would ordinarily have been borne by the lessee, the Commissioners shall substitute as the rental value of the right to work the minerals or the mineral wayleaves,[5] as the case may be, such rent as the Commissioners determine would have been the rent customary in the district [2] if the expenditure had been borne by the lessee.

(3) Every proprietor [3] of any minerals and every person to whom any rent [4] is paid in respect of any right to work minerals or of any mineral wayleave [5] shall, upon notice being given to him by the Commissioners requiring him to give particulars as to the amount received by him in respect of the right or wayleave, as the case may be, and where the proprietor is working the minerals, particulars as to the minerals worked, make a return in the form required by the notice, and within the time, not being less than thirty days, specified in the notice, and in default shall be liable to a penalty not exceeding fifty pounds to be recovered in the High Court.

(4) Mineral rights duty shall be assessed by the Commissioners and shall be payable at any time after the first day of January in the year for which the duty is charged, and any such duty for the time being unpaid shall be recoverable as a debt

[1] See s. 24, *post*, p. 569.
[2] See the final provision in s. 24, *post*, p. 571.
[3] See s. 24, *post*, p. 569.
[4] See *ib.*
[5] See *ib.*
[6] See *ib.*

due to His Majesty from the proprietor [1] of the minerals, where the proprietor [1] is working the minerals, and in any other case from the immediate lessor [2] of the working lessee.[3] As between the immediate lessor [2] and the working lessee,[3] the duty shall be borne by the immediate lessor,[2] notwithstanding any contract to the contrary, whether made before or after the passing of this Act.[4]

(5) Mineral rights duty shall not be charged [5] in respect of common clay, common brick clay, common brick earth, or sand, chalk, limestone, or gravel.[6]

Deduction of duty in case of intermediate leases of minerals.

21.—(1) Any immediate lessor [7] who under this Act pays any mineral rights duty, and is himself a lessee of the right to work the minerals or of the wayleave [8] in respect of which the duty is paid, shall be entitled to deduct from the rent [9] paid by him in respect of the right to work the minerals or the wayleave,[8] as the case may be, to his lessor a sum equal to the mineral rights duty on a rental value [10] of the same amount as the rent [9] payable ; and any person from whose rent [9] any such deduction is made may make a similar deduction from any rent [9] paid by him in respect of the right to work the minerals or in respect of the wayleave,[8] as the case may be.

(2) Any person in receipt of rent [9] from which a deduction may be made under this section shall allow the deduction, and the person making the deduction shall be discharged from

[1] See s. 24, *post*, p. 569.

[2] See *ib.*

[3] See *ib.*

[4] The Act was passed on 29th April, 1910.

[5] This provision was not superfluous when the Act was passed. But under the most recent pronouncements, few (if any) of the specified substances would be considered minerals : see *ante*, pp. 16, 17, 52, 53.

[6] The charge of the duty for the year ending the 31st March, 1910 (see sub-clause (1) of this section), involves a curious result. Having regard to the statutory meanings of "financial year" (*ante*, p. 563, n. [7]), "rental value" (*ante*, p. 563), "working year" and "last working year" (*post*, pp. 570, 571), a working year from, say, September to September, of necessity includes portions of two financial years. If, therefore, a working year ends on a 30th September (or "other approved day," see s. 24, *post*) immediately before 1st January in a dutiable financial year, that working year is the working year, on which the duty payable in the financial year, in which such 1st January falls, is to be based. And since duty is payable for the financial year ending the 31st March, 1910, the last working year for the purpose of such duty is the year ending 30th September, 1909 (or such other date as the Commissioners may approve); and all rent paid in that working year is liable to duty.

[7] See s. 24, *post*, p. 569.

[8] See *ib.*

[9] See *ib.*

[10] See s. 20 (2), *ante*, p. 563.

the payment of an amount of rent [1] equal to the amount deducted, and any contract for the payment of rent [1] without allowing such a deduction shall be void.

(3) If any person refuses to allow a deduction which he is required to allow under this section, he shall be liable to a penalty not exceeding fifty pounds to be recovered in the High Court.

(4) Where in any special case mineral rights duty has been charged on a rental value [2] based on a rent [1] which has been substituted [3] under the provisions of this Act for the rent [1] actually payable by the working lessee,[4] or where in any special case the rental value [2] with reference to which increment value duty is charged has been reduced [5] under the provisions of this Act for the purposes of the collection of that duty, the Commissioners shall, on the application of any lessor from whose rent [1] a deduction may be made in respect of mineral rights duty or increment value duty, as the case may be, make a corresponding substitution or reduction as regards that rent,[1] if they consider that the grounds for the substitution or reduction, as the case may be, are applicable in the case of the rent [1] with respect to which the application is made.[6]

Special provisions as to increment value duty and reversion duty in the case of minerals worked or leased.

22.—(1) No reversion duty[7] shall be charged on the determination of a mining lease,[8] and no increment value duty [9] shall be charged on the occasion of the grant of a mining lease [8] or in respect of minerals which are comprised in a mining lease,[8] or are being worked,[10] except as a duty payable annually in manner provided by this Act.[11]

(2) Increment value duty [9] shall not be charged in the case of any minerals which were, on the thirtieth day of April nineteen hundred and nine, either comprised in a mining lease [8] or being worked [10] by the proprietor,[12] so long as the minerals are for the time being either comprised in a mining lease,[8] or being worked [10] by the proprietor.[12]

[1] See s. 24, *post*, p. 569.

[2] See s. 20 (2), *ante*, p. 563.

[3] See *ib.*

[4] See s. 24, *post*, p. 569.

[5] See s. 3 (5).

[6] There are no provisions in the Act authorising allowances on account of succession duty, or on account of an engineer's yearly fee for surveying.

[7] See ss. 13, etc.

[8] See s. 24, *post*, p. 569; and see the 3rd of the four final provisions of that section, *post*, p. 571.

[9] See ss. 1, etc.

[10] See the 1st, 2nd, and 3rd of the four final provisions of s. 24, *post*, p. 571.

[11] See s. 22 (3), *post*, p. 567.

[12] See s. 24, *post*, p. 569.

Provided that the exemption under this section shall continue to apply in the case of any minerals, although they cease for a temporary period to be comprised in a mining lease [1] or to be worked,[2] so long as the period does not exceed two years.

(3) Increment value duty in respect of the increment value of minerals which are comprised in a mining lease [1] or are being worked [2] shall, where that duty is chargeable,[3] be charged annually,[4] and the increment value shall, instead of being estimated as a capital sum, be taken to be the sum (if any) by which, in each year during which the lease continues or the minerals are being worked,[2] as the case may be, the rental value [5] on which mineral rights duty is charged in respect of the right to work the minerals exceeds the annual equivalent of the original capital value [6] of the minerals, or the capital value [6] of the minerals on the last preceding occasion [7] on which increment value duty has been collected otherwise than as an annual duty,[8] if increment value duty has been so collected before the minerals have become comprised in a mining lease [1] or have commenced to be worked; [2] and the annual equivalent of any such capital value of the minerals shall be taken to be two twenty-fifth parts of that capital value.[6]

(4) If in any case it is shown to the Commissioners that the rental value [5] on which mineral rights duty is charged represents in part a return for money expended within fifteen years by a lessor in boring or otherwise proving the minerals, the rental value shall be reduced for the purposes of the collection of increment value duty by the amount which represents that return.[9]

(5) Increment value duty payable annually under this section shall, instead of being collected as provided by this Act in other

[1] See s. 24, *post*, p. 569, and see the 3rd of the four final provisions of that section, *post*, p. 571.

[2] See the 1st, 2nd, and 3rd of the four final provisions of s. 24, *post*, p. 571.

[3] See sub-s. (2).

[4] The property is being gradually exhausted.

[5] See s. 20 (2), *ante*, p. 563.

[6] See s. 23 (1), *post*, p. 568.

[7] See s. 1.

[8] Mr. Harman (Harman on the Finance Acts, p. 193) thinks that this can only refer to minerals not leased or worked which are specially returned under s. 23 (2), *post*, p. 569.

[9] There are no provisions in the Act authorising allowances for general expenditure.

cases,[1] be recoverable in the same manner as mineral rights duty, with the same right of deduction.[2]

(6) Any proprietor [3] or lessor of any minerals who pays increment value duty in pursuance of this provision shall be entitled to be relieved in any year from the payment of mineral rights duty, as such proprietor or lessor, up to the amount paid by him in that year in respect of increment value duty.

For the purposes of this provision, a deduction [2] of any amount from the rent payable to a lessor on account of mineral rights duty shall be deemed to be a payment of that duty, and the relief may be given either by allowance or repayment or both of those means, as the occasion may require.

(7) Where minerals cease to be comprised in a mining lease [4] or to be worked [5] within the meaning of this section, the capital value [6] of the minerals at the time shall be specially ascertained in accordance with the provisions of this Act,[7] and the capital value [6] as so ascertained shall be treated as the original capital value of the minerals.

(8) Nothing in this section shall apply to minerals which are exempt from mineral rights duty under this Act.[8]

Application of provisions as to total and site value to minerals.

23.—(1) For the purposes of this Part of this Act, the total value of minerals means the amount which the fee simple [9] of the minerals, if sold in the open market by a willing seller in their then condition, might be expected to realise, and the capital value of minerals means the total value, after allowing such deduction (if any) as the Commissioners may allow for any works executed or expenditure of a capital nature incurred *bonâ fide* by or on behalf of any person interested [9] in the minerals for the purpose of bringing the minerals into working, or where the minerals have been partly worked, such deduction as is, in the opinion of the Commissioners, proportionate to the amount of minerals which have not been worked.[10]

(2) For the purposes of valuation [11] under this Part of this Act,

[1] See s. 5.

[2] See s. 21, *ante*, p. 565.

[3] See s. 24, *post*, p. 569.

[4] *Ib.*, and see the 3rd of the four final provisions in that section, *post*, p. 571.

[5] See the 1st, 2nd, and 3rd of the four final provisions of s. 24, *post*, p. 571.

[6] See s. 23 (1), *infra*.

[7] See s. 26.

[8] See s. 20 (5), *ante*, p. 565. The phraseology of s. 22 (8) begs the question as to the specified substances being minerals.

[9] See s. 41.

[10] There are no provisions in the Act authorising allowances for general expenditure.

[11] See s. 26.

all minerals shall be treated as a separate parcel of land ; [1] but, where the minerals are not comprised in a mining lease [2] or being worked,[3] they shall be treated as having no value as minerals, unless the proprietor [4] of the minerals, in his return furnished to the Commissioners, specifies the nature of the minerals and his estimate of their capital value.[5]

Minerals which are comprised in a mining lease [2] or are being worked [3] shall be treated as a separate parcel of land,[1] not only for the purposes of valuation,[6] but also for the purpose of the assessment of duty [7] under this Part of this Act.

(3) The provisions of this Part of this Act with respect to valuation [6] shall not apply to minerals which were, on the thirtieth day of April, nineteen hundred and nine, either comprised in a mining lease [2] or being worked [3] by the proprietor,[4] so long as they are for the time being either comprised in a mining lease [2] or being worked [3] by the proprietor,[4] nor shall such provisions apply to any minerals which cease for a temporary period to be comprised in a mining lease [2] or to be worked [3] so long as the period does not exceed two years.

(4) Except where the context otherwise requires,[8] any references in this Part of this Act to the site value [9] of land shall, in cases where the land consists solely of minerals, or comprises minerals, be construed, so far as respects the minerals, as a reference to the capital value [5] of the minerals.

Definitions for purpose of mineral provisions.

24. For the purpose of the provisions of this Act as to minerals—

The expression " proprietor " means the person for the time being entitled in possession to the minerals, or to the rents and profits thereof, or any part of those rents and profits, but does not include a person entitled as lessee other than a person entitled to the possession of land comprised in a lease for any long term of years to which section sixty-five

[1] *Primâ facie* they would be included in a parcel of land: see *ante*, pp. 52, 53, 562.

[2] See s. 24, *infra*.

[3] See the 1st, 2nd, and 3rd of the four final provisions of s. 24, *post*, p. 571.

[4] See s. 24, *post*, and see *ante*, p. 567, n. [8].

[5] See sub-clause (1) of this section. As to whether the proprietor ought, in his own interest, to make a return, see Harman, p. 196.

[6] See s. 26.

[7] See s. 29.

[8] It is difficult to see to what these words refer. See the explanation suggested by Mr. Harman at pp. 196, 197.

[9] See s. 25, *post*, p. 571.

of the Conveyancing and Law of Property Act, 1881, applies;

The expression "rent" includes yearly or other rent, and shall, in addition to the meaning assigned to it for the general purposes of this Part of this Act,[1] be construed as including any fine, premium, or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift;

Where any rent is paid or rendered otherwise than in money or money's worth, the amount of the rent shall be taken to be such sum as the Commissioners consider to be the value thereof;

The expression "mining lease" means a lease[2] for mining purposes, that is, for searching for, winning,[3] working, getting, making merchantable, carrying away, or disposing of, mines and minerals, or purposes connected therewith, and includes an agreement for such lease, or any tenancy or licence,[4] whether by deed, parol, or otherwise for mining purposes,[5] and the expressions "lessor" and "lessee" shall in addition to the meaning assigned to them for the general purposes of this Part of this Act [6] be construed so as to include respectively a licensor and a licensee; [4]

The expression "working lessee" [7] means as respects the right to work minerals the lessee who is actually working the minerals, or who would have the right actually to work the minerals if the minerals were worked, and as respects mineral way-leaves [8] the lessee who is in actual enjoyment of the way-leave, and the expression "immediate lessor" [9] shall be construed accordingly;

The expression "working year" means the year ending the thirtieth day of September, or such other day as may in any case be approved by the Commissioners; and the

[1] S. 41 provides that the expression "rent" "has the same meaning as in the Conv. and Law of Property Act, 1881" (as to which see *ante*, p. 181, n. [6]), "and does not include a rentcharge." As to Scotland, see s 42.

[2] See s. 41.

[3] As to "winning" and "won," see the meaning of "win," *ante*, pp. 243, 246, 247.

[4] See *ante*, pp. 269 *et seq.*

[5] Cf. the definitions in the Conv., &c., Act, 1881, *ante*, p. 181, n. [6], and the S. L. Act, *ante*, pp. 186—188.

[6] See s. 41.

[7] See s. 20 (2), *ante*, p. 563.

[8] See *infra* in the present section.

[9] See ss. 20 (4) and 21 (1), *ante*, pp. 564, 565.

expression "last working year" [1] means the working year completed immediately before the first day of January in any financial year for which the duty is paid;

The expression "mineral way-leave" [2] means any way-leave, air-leave, water-leave, or right to use a shaft granted to or enjoyed by a working lessee,[3] whether above or under ground, for the purpose of access to or the conveyance of the minerals, or the ventilation or drainage of his mine or otherwise in connexion with the working of the minerals.

Where any minerals are at any time being worked [4] by means of any colliery, mine, quarry, or open working, all the minerals which belong to the same proprietor,[5] if the minerals are being worked by the proprietor,[5] or which the lessee has power to work if the minerals are being worked by a lessee, and which would, in the ordinary course of events, be worked by the same colliery, mine, quarry, or open working, shall be deemed to be minerals which are being worked [4] at that date.

Minerals which are being won [6] for the purpose of being immediately worked shall be deemed to be minerals which are being worked.[4]

Minerals shall be deemed to be comprised in a mining lease [7] if the right to work the minerals is the subject of a mining lease, or if the minerals are being worked under the terms of such a lease, although the lease has expired.

Where the circumstances of a district are such that in the opinion of the Commissioners it is impracticable to fix any sum which satisfactorily represents a rent customary in the district,[8] the rent which would be paid under similar circumstances and ordinary conditions elsewhere than in the district shall be substituted for the rent customary in the district.[9]

Section 25, which contains definitions of "site value" and

[1] See s. 20 (2), *ante*, p. 563.

[2] See ss. 20 (2), (3), 21 (1), *ante*, pp. 563—565.

[3] See s. 20 (2), *ante*, p. 563.

[4] See ss. 20 (2), 22 (1) (2) (3) (7), 23 (2) (3), *ante*, pp. 563, 564—569.

[5] See the first definition in s. 24.

[6] As to "winning" and "won," see the meaning of "win," *ante*, pp. 246, 247.

[7] See the third definition in s. 24.

[8] See s. 20 (2) and (3), *ante*, pp. 563, 564.

[9] The four final provisions of s. 24 (as well as the previous provisions) are described as "definitions" in the sidenote.

"total value" of "land" is not applicable for the purpose of the valuation of minerals.[1] But references in the Act to the "site value of land" are construed as a reference to the "capital value of the minerals." [2]

S. 34. Section 34, which provides for the appointment of referees to hear appeals, requires that persons having experience in the valuation of minerals shall be included.[2a]

f.—RATES.

(*a*) *Property Liable.*

Mines and quarries. Mines and quarries of every description are rateable to the relief of the poor; [3] and are also liable to all county

[1] See s. 25 (5).

[2] See s. 23 (4), *ante*, p. 569, and notes thereto.

[2a] The following rules have been made under this Act:—Increment Value Duty on 4th June, 1910 (see 1910, W. N. 209–211), and 3rd July, 1910 (see 1910, W. N. 257); Land Values (Reference) Rules on 10th Sept., 1910 (see 1910, W. N. 281–283), and 14th Jan., 1911 (see 1911, W. N. 29–31); Finance Acts Repeals Rules on 21st Jan., 1911 (see 1911, W. N. 51, 52).

[3] 43 Eliz. c. 2; Rat. Act, 1874 (37 & 38 Vict. c. 54), s. 3. Prior to the latter Act the law as to the rateability of mines and quarries to the poor was in a very anomalous state. By 43 Eliz. c. 2, it was enacted (s. 1) that the churchwardens and overseer of every parish should raise by taxation of every "occupier of lands, houses, tithes, coal mines, or saleable underwoods," a sufficient sum of money for the relief of the poor according to the ability of the parish. Lime works (Atkins *v.* Davis, Cald. 338; R. *v.* Alberbury, 1 East, 534); brick works (R. *v.* Westbrook, R. *v.* Everist, 10 Q. B. 178); slate works (R. *v.* Woodland, 2 East, 164); clay pits (R. *v.* Brown, 8 East, 528; Glasgow *v.* Farie, 13 A. C. 677); and gravel, sand, or marl pits (R. *v.* Woodland, 2 East, 167); which were really such, and were not mines in the proper sense of that word (*ante*, pp. 5 and 6); were treated as "lands" within the meaning of the Act; and were therefore rateable. Coal mines having been expressly mentioned in the Act were, of course, also rateable. But, having been alone mentioned, a long course of decision had established, that lead mines (Lead Co. *v.* Richardson, 3 Burr. 1341; Rowls *v.* Gells, 2 Cowp. 453); ironstone mines (R. *v.* Cunningham, 5 East, 478; R. *v.* Bilston, 5 B. & C. 851; Crawshay *v.* Morgan, L. R. 4 Q. B. 581; affirmed Morgan *v.* Crawshay, L. R. 5 H. L. 304; Guest *v.* East Dean, L. R. 7 Q. B. 334; Kittow *v.* Liskeard, 10 *ib.* 15); limestone mines (R. *v.* Sedgley, 2 B. & Ad. 65); freestone mines (R. *v.* Dunsford, 2 A. & E. 568; R. *v.* Randall, 4 E. & B. 564); clay mines (R. *v.* Brettel, 3 B. & Ad. 424); salt mines (R. *v.* Sedgley, 2 B. & Ad. 74); and all other mines than coal mines (R. *v.* Baptist Mill Co., 1 M. & S. 618; Crease *v.* Sawle, 2 Q. B. 886; Kittow *v.* Liskeard, *sup.* 12; Glasgow *v.* Farie, *sup.* 676, 677; Thursby *v.* Briercliffe-with-Extwistle, 1895, A. C. 37, 38); could not be treated as "lands," and were exempt from the liability. It had also, by a very peculiar doctrine (*per* Blackburn, J., in Roads *v.* Trumpington, L. R. 6 Q. B. 64), been established, that, where mines other than coal mines were in lease or occupation; and the lessor, or person receiving, received a money rent (R. *v.* Rochester, 12

rates,[1] borough rates,[2] highway rates,[3] "lighting" and "watching" rates,[4] and other local rates leviable upon property rateable to the relief of the poor.[5]

Subsidiary property.

And the rateability extends to surface lands, roads and watercourses; and to shafts, buildings, and machinery; used in connection with a mine or quarry.[6] And it also extends to

East, 353; R. *v.* Baptist Mill Co., *sup.* 619; R. *v.* Welbank, 4 M. & S. 222; R. *v.* Tremayne, 4 B. & Ad. 162; R. *v.* Crease, 11 A. & E. 577); or a proportionate part of the produce of the mines in an altered state (R. *v.* Pomfret, 5 M. & S. 139); he was not liable to be rated: but that, where he received a proportionate part of the produce in its natural and primitive state; as under the custom of tin-bounding in Cornwall (R. *v.* St. Agnes, 3 T. R. 480; R. *v.* Crease, 11 A. & E. 677; Crease *v.* Sawle, 2 Q. B. 862, 886; p. 485 of the 3rd edition of this book); or under the custom of Derbyshire (Rowls *v.* Gells, 2 Cowp. 451; p. 568 of same); or under express stipulation (R. *v.* Baptist Mill Co., 1 M. & S. 612; R. *v.* St. Austell, 5 B. & Al. 693; R. *v.* Todd, 12 A. & E. 816); he was so liable. And it had been further established, that the occupiers of surface land, with buildings and machinery thereon; or of a watercourse; used in connection with a mine not itself rateable under the Act of Eliz.; were rateable in respect of such surface buildings and machinery (Guest *v.* East Dean, L. R. 7 Q. B. 334; Kittow *v.* Liskeard, 10 *ib.* 7); or of such watercourse (Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 478): overruling R. *v.* Bilston, 5 B. & C. 851; according to which the subsidiary property was to be regarded as part of the mine itself, and as not therefore rateable. The Rat. Act, 1874 (s. 3), extended the liability to mines of every kind not mentioned in the Act of Eliz.

[1] Under the consolidating Act, 15 & 16 Vict. c. 81, all hereditaments then rateable to the relief of the poor were made rateable to the county rates; and by the Rat. Act, 1874 (ss. 10, 15), all hereditaments thereby made rateable to the relief of the poor (see *supra*) were made rateable to the county rates.

[2] See 5 & 6 Will. 4, c. 76, s. 92; Rat. Act, 1874, ss. 10, 15.

[3] The Act 5 & 6 Will. 4, c. 50, s. 27, made rateable for highway purposes "all property now liable to be rated and assessed to the relief of the poor, provided that the same rate shall also extend to such woods, mines, and quarries of stone or other hereditaments, as have heretofore been usually rated to the highways." The liability under this Act to highway rates was, accordingly, capable of a greater extension than the liability to poor rates; which, so far as related to mines, was confined to coal mines: *ante*, p. 572, n. [3]. And it was decided, that this liability was not limited to the identical mines actually rated before the passing of the Act; but that it applied to mines of the same description as those previously usually rated in the parish in question, although opened and worked for the first time subsequently to the passing of the Act. See R. *v.* Randall, 4 E. & B. 564, a case of a stone mine. By the Rat. Act, 1874, all hereditaments thereby made rateable to the relief of the poor were made rateable to the highway rates: ss. 10, 15. See also Pub. Hea. Act, 1875, ss. 144, 216.

[4] See 3 & 4 Will. 4, c. 90, s. 9; Pub. Hea. Act, 1875, s. 163; Rat. Act, 1874, ss. 10, 15.

[5] See as to "general district rate," Pub. Hea. Act, 1875, s. 211. See also Rat. Act, 1874, ss. 10, 15.

[6] See *ante*, p. 572, n. [3]. See also R. *v.* Granville, 9 B. & C. 188; Tyne Co. *v.* Wallsend, 46 L. J. M. C. 185; Holywell Union, &c. *v.* Halkyn Drainage Co., 1895, A. C. 117.

land, buildings, and machinery; and to roads; of which a person working a mine or quarry is in exclusive occupation; although he be only working under a licence.[1]

Rateability depends on working, not profitableness.

Mines or quarries, if they are actually being worked, are rateable, although they may be unprofitable.[2] They are not, however, rateable before they are worked, and become productive;[3] or after they have ceased to be productive.[4] And, although the occupiers of mines or quarries, which have ceased to be productive, are rateable in respect of surface lands, occupied therewith; they are not rateable in respect of buildings, boilers, engines, plant, or railways so occupied; if these things are in substance only part thereof, and are not shown to have any independent value.[5]

(β) *Chargeable Value.*

"Lighting" and "watching."

With respect to "lighting" and "watching," the Act 3 & 4 Will. 4, c. 90, s. 33, provides that the overseers of the poor of any parish, to which the provisions of the Act shall be extended, "shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish; provided always that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act."

Thursby *v.* Briercliffe-with-Extwistle.

In *Thursby* v. *Briercliffe-with-Extwistle*[6] the appellants' premises consisted of coal mines, 500 feet at least below the surface, and having no shaft or opening to the surface within the respondents' township; and therefore deriving no benefit from the rate. It was contended that such mines were "land," and not "property (other than land);" and that the appellants were therefore liable to be rated on the lower scale only.

[1] Roads *v.* Trumpington, L. R. 6 Q. B. 56; Kittow *v.* Liskeard, 10 *ib.* 7. A mere licensee, as such, is not rateable: see *post*, pp. 578, 579.

[2] R. *v.* Parrot, 5 T. R. 593, 596; R. *v.* Bedworth, 8 East, 387; R. *v.* St. Austell, 5 B. & Al. 699.

[3] R. *v.* Rochester, 12 East, 358; R. *v.* Fayle, 27 L. T. 65.

[4] R. *v.* Bedworth, *sup.*; R. *v.* Westbrook, 10 Q. B. 202.

[5] Tyne Co. *v.* Wallsend, *sup.*

[6] 1895, A. C. 32.

It was, however, held, that "land" was used in the same sense in which it was used in the statute 43 Eliz. c. 2;[1] that it did not therefore include coal mines; and that accordingly coal mines were "property (other than land)."[2]

Crayford *v.* Rutter.

On the other hand, in *Crayford* v. *Rutter*,[3] the respondents occupied land, with engine-houses and other buildings upon it, for the purposes of a brickfield, the brick earth being dug from a portion of the land and manufactured into bricks on other portions. All the land and buildings were used exclusively for the business of brickmaking. It was held (1) that the brickfield was rateable as "land," and not as "property (other than land)"; and (2) that, assuming that they could not be rated apart from the land as being capable of being put to some other than their present use, the buildings were also rateable as "land," and not as "buildings" or "property (other than land)."

Hypothetical rent—mines (not being tin, lead, or copper) and quarries.

Mines or quarries, other than tin mines, lead mines, or copper mines, are rateable upon an estimate "of the rent at which the same might reasonably be expected to let from year to year; free of all usual tenants' rates, and taxes, and tithe commutation rent-charge (if any); and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."[4] Where such mines or quarries are in the occupation of a lessee; although the sums, which he pays, whether by way of rent strictly so called, or by way of royalty, or by way of rent and royalty, do not necessarily form the basis of the rate in the sense of determining its amount; they are all within the statutory meaning of "rent."[5]

Tin, lead, or copper mines —statutory meanings of "mine," "dues," "lease," and "fine."

In the Rat. Act, 1874, the following words, when applied to a tin, lead, or copper mine, have or include the following meanings:—The word "mine," when a mine is occupied under a lease, includes the underground workings, and the engines,

[1] See *ante*, p. 572, n. [3].

[2] Affirming S. C. (*per* Lopes and Davey, L. JJ., the latter hesitating), 1894, 2 Q. B. 11, which affirmed S. C. 1894, 1 Q. B. 567.

[3] 1897, 1 Q. B. 650.

[4] See the Par. Ass. Act, 6 & 7 Will. 4, c. 96, s. 1. See also 15 & 16 Vict. c. 81, s. 6; Pub. Hea. Act, 1875, s. 211. Cf. the decision, before the Par. Ass. Act, of R. *v.* Attwood, 6 B. & C. 277. As to mines in Ireland, see Comm. of Valuation *v.* Clonbrock Coal Co., 1896, 2 I. R. 560.

[5] R. *v.* Attwood, *sup.*; R. *v.* Westbrook, R. *v.* Everist, 10 Q. B. 178, 203, 207; Comm. of Valuation *v.* Clonbrock Coal Co., *sup.*

machinery, workshops, tramways, and other plant, buildings (not being dwelling-houses), and works and surface of land occupied in connection with, and for the purposes of, the mine, and situate within the boundaries of the land comprised in the lease or leases, under which the dues, or dues and rent, are payable or reserved. The word "dues" means dues, royalty, or toll, either in money, or partly in money and partly in kind; and the amount of dues, which are reserved in kind, means the value of such dues. The word "lease" means lease or sett, or licence to work, or agreement for a lease or sett, or licence to work. And the word "fine" means fine, premium, or foregift, or other payment or consideration in the nature thereof.[1]

Statutory meanings of "gross value" and "rateable annual value."

Where a tin, lead, or copper mine is occupied under a "lease" or "leases" granted without "fine," on a reservation wholly or partly of "dues" or rent, the "gross value" is the annual amount of the whole of the "dues" during the year ending on December 31st preceding the date at which the valuation list or poor-rate [2] is made; in addition to the annual amount of any reserved fixed rent, which may not be paid or satisfied by such "dues." And the "rateable annual value" is the same as the gross value; except that, where the person receiving the "dues" or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of "dues" or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable, is deducted from the gross value for the purpose of calculating the rateable value.[3] Where any such mine is occupied under a "lease," granted wholly or partly on a "fine;" or where any such mine is occupied and worked by the owner; or, in the case of any other such mine, to which the other provisions as to tin, lead, and copper mines do not apply, and of which the royalty or "dues" are not wholly reserved in kind; [4] the gross and rateable annual value are the annual amount of the "dues," or "dues" and rent, at which the mine might reasonably be expected to let without "fine" on a lease of the ordinary duration, according to the usage of the country; if the tenant undertook to pay all

[1] See s. 7.
[2] See s. 15.
[3] S. 7.
[4] See s. 13.

tenants' rates and taxes, and tithe rent-charge; and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of "dues," or "dues" and rent.[1]

Snailbeach Co. *v.* Forden —double rating.

A lease comprised a lead mine, land, and works; the mine and most of the works being in the union in question, and the land and the remaining works being in the neighbouring union. After the ore was crushed and washed, it was taken by a tramway about half a mile to a smelting house, forming part of the works in the neighbouring union, and was there converted into lead for sale. It was held, (1) that the crushing, washing, and smelting works were all included under "mine," as above defined, as being "in connection with, and for the purposes of the mine;" (2) that the rating authorities were not entitled to assess any part of the mine twice over; and, accordingly, (3) that, in order to obtain the rateable value of the mine in the union in question, a deduction should be made from the gross dues in respect of the rateable premises in the neighbouring union.[2]

Royalty.

In making a prospective rate on a lessee, who pays royalty, the rate should, in order to calculate the royalty, be, in general, assessed on the following principle:—Regard should, in general, be had to the quantum which the plant and machinery used in the particular working are capable of producing within the year of rating, in the absence of proof, that such quantum cannot or will not be produced; and on the quantum which they are supposed to produce in the particular year.[3] If, however, the lessee shows that he could not prudently contract by anticipation to pay more than an amount smaller than the calculated royalty, the smaller amount will be the true criterion according to which to rate him.[4]

Enhanced value.

A licensee of the right of working coprolites in a parish, in which the rates were made quarterly, dug ten acres every year; and was in possession of ten acres one whole year; but only exhausted about two and a quarter acres in each quarter. Three acres and a half were the greatest quantity used by him at any one time for coprolite purposes; and six acres and a

[1] See s. 7.

[2] Snailbeach Co. *v.* Forden, 35 L. T., N. S. 514.

[3] R. *v.* Westbrook, R. *v.* Everist, 10 Q. B. 178.

[4] *Ib.*; see p. 206.

half, from which the coprolites had been raised, always lay unproductive. His occupation was perpetually shifting. It was held, that he was rateable in each quarterly rate in respect of ten acres at their enhanced or coprolite value.[1] The amount, at which property used in connection with a mine is rateable, is not the mere amount of the agricultural value of the land on which such property stands; but the amount of the enhanced value which the land has through the existence of such property.[2]

Convenience and situation —profits.

The convenience and situation of a mine or quarry should be considered in estimating its rateability. But the actual profits which its occupier makes are not material, and cannot be allowed to influence the assessment.[3]

Allowances.

An allowance may be made in respect of rates on account of the necessity of repairing and replacing works and engines.[4] But in no case can an allowance be made for expenditure in rendering mines or quarries productive.[5] Nor can the amount of the rate be affected by the circumstance that the subject-matter is being gradually exhausted.[6]

(γ) *Person Liable.*

Generally.

The person liable is the occupier.[7] And by this is meant the person who has the sole and exclusive possession;[8] either by himself, or by his servants or agents.[9]

Licensee.

A person, who has a mere licence to remove the produce of a mine or quarry, without more, is not an occupier of it; and is not, therefore, rateable.[10] And, although a person who has a licence to work a whole mine or quarry, and who enters on

[1] R. *v.* Whaddon, L. R. 10 Q. B. 230, *per* Mellor, Lush, and Archibald, JJ.; Cockburn, C. J., dissenting.

[2] See Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 478; 9 B. & S. 210: a case of a watercourse.

[3] R. *v.* Aylesford, 26 L. T., N. S. 618.

[4] R. *v.* Tomlinson, 9 B. & C. 163, 166; R. *v.* Granville, *ib.* 191.

[5] R. *v.* Attwood, 6 *ib.* 677; R. *v.* Westbrook, R. *v.* Everist, 10 Q. B. 178; Coltness Co. *v.* Black, 6 A. C. 331; Comm. of Valuation *v.* Clonbrock Coal Co., 1896, 2 I. R. 560.

[6] R. *v.* Attwood, *sup.*; R. *v.* Westbrook, R. *v.* Everist, *sup.*; Coltness Co. *v.* Black, *sup.*: cf., as to income tax, *ante*, p. 560.

[7] See s. 1 of 43 Eliz. c. 2, cited *ante*, p. 572, n. [3].

[8] Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 484; Kittow *v.* Liskeard, 10 *ib.* 13, 14; R. *v.* Whaddon, *ib.* 242.

[9] Kittow *v.* Liskeard, L. R. 10 Q. B. 7.

[10] See R. *v.* Trent Co., 4 B. & C. 57; R. *v.* Alnwick, 9 A. & E. 444; Roads *v.* Trumpington, L. R. 6 Q. B. 62; Morgan *v.* Crawshay, L. R. 5 H. L. 316; Kittow *v.* Liskeard, L. R. 10 Q. B. 13; R. *v.* Whaddon, *ib.* 244.

a part, may be in constructive possession of the whole,[1] he is only, for rating purposes, in occupation of the part.[2] But where a licensee has an exclusive right to occupy the soil containing the mine in question, he may be rateable in respect of such soil.[3] And where a licensee agreed to "forthwith enter upon" land, and there dig, and effectually fence the excavations, and complete them by a given time, and reinstate the land, and then "yield and deliver up" the land to the grantor; and the excavations and works contemplated by the agreement required a constant occupation of the land; and it was impossible to use the land for any other purpose from the commencement of the excavations until the reinstatement; it was held, that the licensee had the exclusive right to occupy the soil; and was rateable accordingly.[4]

Grantee of easement.

A person, who has a mere easement to use a wayleave,[5] or waterleave,[6] for mining purposes, is not an occupier; so as to make him rateable in respect of it. But if, under a grant of a wayleave with liberty to erect a bridge, the grantee makes a way, and incloses it, and thereby excludes all other persons, he becomes an occupier of the wayleave for rating purposes.[7] And, if the grantee of a waterleave constructs a watercourse with pipes and culverts, he becomes an occupier of the land containing them.[8]

Cost-book company.

The members of a cost-book company may have an occupation for rating purposes.[9] But the purser, secretary, and chief managing agent for the time being, of any tin, lead, or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier.[10]

Galee.

The interest of a galee of mines or quarries in the Forest of Dean, or Hundred of St. Briavels,[11] is probably capable of occupation for rating purposes.[12]

[1] See *ante*, pp. 81, 272, 273.

[2] R. *v.* Fayle, 27 L. T. 64, 65.

[3] *Ib.*; Roads *v.* Trumpington, L. R. 6 Q. B. 56.

[4] Roads *v.* Trumpington, L. R. 6 Q. B. 56.

[5] R. *v.* Jolliffe, 2 T. R. 90; Watkins *v.* Milton-next-Gravesend, L. R. 3 Q. B. 356.

[6] Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 484.

[7] R. *v.* Bell, 7 T. R. 598.

[8] Talargoch Co. *v.* St. Asaph, *sup.* 478.

[9] Kittow *v.* Liskeard, L. R. 10 Q. B. 7.

[10] Rat. Act, 1874, s. 7. As to cost-book companies, see Chap. XIX. of the 3rd edit. of this book.

[11] See p. 540 of the 3rd edit. of this book.

[12] Morgan *v.* Crawshay, L. R. 5 H. L. 304.

Rateability depends on occupancy, not title.

A person in actual occupation, although a licensee, or even a mere trespasser, is rateable. For the nature of his title is, for rating purposes, immaterial.[1]

Lessor, &c., sometimes rateable—tin-bounder—Derbyshire custom.

However, where a mine other than a coal mine [2] is in lease or occupation, and the rent or royalty or due is wholly reserved or received in kind; whether under the custom of tin-bounding in Cornwall,[3] or under express stipulation;[4] the lessor or person receiving is rateable, as being in receipt of a portion of the mine, and the lessee or occupier is exempt.[5] And, even where a lessor has the option of receiving the royalty in kind or in money; and he elects to receive it in money; he is rateable, and the lessee is exempt.[6] And the liability of the lessor is not affected by the circumstance that the property in question is not, in strictness, of itself, and apart from adjoining property demised to the same lessee, a mine; if no part of such adjoining property is at the time in process of working.[7] Indeed, even if such adjoining property is at the time in process of working, the lessor is nevertheless apparently rateable.[8] For although one mine may extend through the properties of a variety of owners, each property may contain a mine for rating purposes.[9] Although, however, in such cases, the lessee may be exempt, his exemption is confined to the mine itself. He is rateable in respect of shafts, buildings, and machinery; and of surface land, and watercourses; used in connection therewith.[10] Before the Rat. Act, 1874, a lessee of Crown mines subject to the Derbyshire custom, or a lessee under any other person entitled to the mineral duties,[11] was rateable, as being in receipt of a portion of the mine; and the miner was exempt.[12] But it

[1] R. *v.* Bell, 7 T. R. 598; Kittow *v.* Liskeard, *sup.* 13—15; Holywell Union, &c. *v.* Halkyn Drainage Co., 1895, A. C. 117.

[2] In the case of coal mines the lessee was always rateable: see *ante*, p. 572, n. [3].

[3] See R. *v.* St. Agnes, 3 T. R. 480; R. *v.* Crease, 11 A. & E. 679; Crease *v.* Sawle, 2 Q. B. 862, 886. See *ante*, p. 572, n. [3], and pp. 484, 485 of the 3rd edit. of this book.

[4] R. *v.* Baptist Mill Co., 1 M. & S. 612; R. *v.* St. Austell, 5 B. & Al. 693; R. *v.* Todd, 12 A. & E. 816.

[5] This was so before the Rat. Act, 1874: see *ante*, p. 572, n. [3]. And the law has not been changed: see Rat. Act, 1874, s. 13; Van Mining Co. *v.* Llanidloes, 1 Exch. D. 310.

[6] R. *v.* St. Austell, 5 B. & Al. 693; Van Mining Co. *v.* Llanidloes, *sup.*

[7] Van Mining Co. *v.* Llanidloes, *sup.*

[8] Van Mining Co. *v.* Llanidloes, *sup.*

[9] *Ib.*: see *ante*, pp. 2, 3.

[10] Van Mining Co. *v.* Llanidloes, *sup.* The law was the same before the Rat. Act, 1874: see *ante*, p. 572, n. [3].

[11] See p. 557 of the 3rd edit. of this book.

[12] See Rowls *v.* Gells, 2 Cowp. 451.

may be doubted whether the Act has not altered the position of the miner in that respect.[1] Whether the grantor of a way-leave, who receives a rent or royalty in respect of it, and whose grantee is exempt, is himself liable in respect of the rent or royalty, appears doubtful.[2]

Deduction from rent.

The liability to rates of mines other than coal mines was first established by the Rat. Act, 1874.[3] It was accordingly thereby enacted that, where any poor or other "local" rate; which, at the commencement of the Act,[4] any lessee, licensee, or grantee of a mine, was exempt from being rated to in respect of such mine; became payable by him in respect of such mine during the continuance of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues, was liable to revision or readjustment; he might (unless he had specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues, one-half of any such rate paid by him; provided that he should not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to, if calculated upon the rent, royalty, or dues.[5] Any payment so authorised to be deducted is a good discharge for such amount of rent, royalty, or dues[6] as is equal to the amount of such payment; and it may be recovered as an ordinary debt from the person to whom the rent, royalty, or dues may be payable. And the person receiving the rent, royalty, or dues, has the same right of appeal and objection as he would have if he were the occupier.

Meaning of specific contract.

Where a lease of iron mines, executed before the commencement of the Act,[4] contained a covenant by the lessee to pay a certain rent, free of "all rates, taxes, tithe rent-charges, expenses, and deductions whatsoever, parliamentary, parochial, or of any other nature," it was held, that a specific contract was not thereby constituted; so as to disentitle the lessee to

[1] S. 13 (as to which see Van Mining Co. *v.* Llanidloes, *sup.*) can hardly be applicable. For duties, which include "cope" (as to which see pp. 568, 569 of the 3rd edit. of this book), would not be "wholly reserved in kind."

[2] R. *v.* Jolliffe, 2 T. R. 90.

[3] See *ante*, p. 572, n. [3].

[4] The Act, as to most of its provisions, came into operation on April 6th, 1875: see s. 11.

[5] S. 8.

[6] S. 9.

deduct one-half of the rate from the rent.[1] And even where such a lease contained covenants by the lessee to pay certain rents and royalties, "free and clear of and from all cesses, taxes, rates, charges, and impositions whatsoever, laid or imposed, or hereafter to be charged, laid, or imposed" by parliament or otherwise; and to pay them "free from all deductions whatsoever;" and to pay "all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are, or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed or imposed," landlord's property-tax excepted; a similar decision was arrived at.[2]

(δ) *Place of Liability.*

Place of liability.

Where a mine lies in several parishes, it is rateable proportionately in each of them; although the adit and machinery may be situate in one only.[3] Where an Inclosure Act enacted that the allotments to be set out thereunder should be deemed to be situate in a different parish from that in which they would naturally be situate; but that nothing in the Act should affect the owner's right to certain mines; it was held, that the enactment only affected the portion of the soil actually allotted to the commoners, and did not affect the mines; and that the mines remained rateable in the parish in which they were actually situate, as before the Act.[4]

g.—TITHES.

Tithes.

Tithes are not payable, of common right, of quarries of stone, gravel, turf, tin, lead, brick, lime, marl, coal, chalk, and such-like; these substances being a produce of the earth, and not an annual produce.[5] But ore payable by way of tithe may be due by custom; as is or was the case in Worselworth, Hartington, and Eyam, in Derbyshire,[6] and Stoney Middleton, in the same county;[7] Teasdale Forest, in the county of

[1] Devonshire *v.* Barrow Co., 2 Q. B. D. 286.

[2] Chaloner *v.* Bolckow, 3 A. C. 933. See this case for a statement of the principle of the provision in question.

[3] R. *v.* Foleshill, 2 A. & E. 593; Snailbeach Co. *v.* Forden, 35 L. T., N. S. 514, 517; *ante*, p. 577.

[4] R. *v.* Pitt, 5 B. & Ad. 565.

[5] 2 Inst. 657; Amiles *v.* Chambers, 1 Mod. 35; Stoutfil's Case, 2 Mod. 77; Buxton *v.* Hutchinson, 2 Vern. 46.

[6] See p. 575 of the 3rd edit. of this book.

[7] *Ib.*

Durham,[1] and Stanhope and Wolsingham, in the same county ;[2] and Arkilgarthdale, in Yorkshire.[3] Mineral tithes are not within the Tithe Comm. Act, 6 & 7 Will. 4, c. 71.[4] But they may be made the subject of a parochial agreement under the Tithe Comm. Act, 2 & 3 Vict. c. 62.[5]

h.—PAUPER SETTLEMENTS.

Pauper settlements.

It is doubtful whether a coal mine is "land" within the Act 6 Geo. 4, c. 57 ; so as to enable an occupation of it to confer a settlement.[6] But if it is, it must be rented at 10*l.* a year at the least, for the whole of the year during which it is occupied.[7] A pauper freeholder, entitled to dig turf for his own use, and get stone from a common, is not, therefore, irremovable from the parish under the Acts 14 Car. 2, c. 12, and 35 Geo. 3, c. 101, s. 1.[8]

[1] See p. 577 of the 3rd edit. of this book.
[2] See p. 578 of same.
[3] *Ib.*
[4] See s. 90.
[5] See s. 9.
[6] See R. *v.* West Ardsley, 4 B. & S. 95.
[7] *Ib.*
[8] R. *v.* Warkworth, 1 M. & S. 473.

CHAPTER XXI.

Sect. 1.—COAL MINES, Etc.

a.—THE COAL MINES ACT, 1911.

(1 & 2 Geo. 5, c. 50.)

An Act to consolidate and amend the Law relating to Coal Mines and certain other mines. [16th December, 1911.]

The dates and sections in the margin of the text refer to the corresponding sections of the following Acts, which are repealed to the extent stated in the Fourth Schedule of the present Act (*post*, p. 675), viz.—

1887 = The Coal Mines Regulation Act, 1887.
1896 = The Coal Mines Regulation Act, 1896.
1900 = The Mines (Prohibition of Child Labour Underground) Act, 1900.
1903 = The Coal Mines Regulation Act (1887) Amendment Act, 1903.
1906 = The Notice of Accidents Act, 1906.
1907 = The Employment of Women Act, 1907.
1910 = The Mines Accidents (Rescue and Aid) Act, 1910.

Application of Act.

Application of Act. [1887, s. 3.]

1. The mines to which this Act applies are mines of coal, mines of stratified ironstone, mines of shale, and mines of fire-clay;[1] and in this Act the expression "mine," unless the context otherwise requires, means a mine to which this Act applies.[2]

[1] The Met. Mines Acts apply to all mines not within the Coal Mines Acts: Met. Mines Act, 1872, s. 3, *post*, p. 695. As to determining which Acts apply to a particular mine, see s. 113 of this Act, *post*, p. 659, and Met. Mines Act, 1872, s. 39, *post*, p. 723.

[2] Mine is defined by s. 122, *post*, p. 660. Except for the express exclusion of manufacturing premises, this definition is identical with that contained in s. 75 of the Act of 1887. It has been held that the word "mine" in that Act included the seams which were in fact opened, whether one or more: Thorpe *v.* Davies, 1908, 2 K. B. p. 753.

Part I.

Management.

Managers.

Appointment of manager of mine. [1887, s. 20.]

2.—(1) Every mine shall be under one manager, who shall be responsible for the control, management, and direction of the mine,

[New provisions are marked by a line.]

and the owner or agent [1] of every mine shall appoint himself or some other person to be the manager of such mine.

(2) If any mine is worked without there being such a manager for the mine as is required by this section, the owner and agent shall each be guilty of an offence against this Act: [2]

Provided that, if the person appointed to be manager of a mine, by reason of death, resignation, or otherwise, ceases to be manager, nothing in this section shall prevent the mine being worked (for a period not exceeding four months) until a new manager is appointed, if in the meantime a competent person holding a first-class or second-class certificate [3] of competency under this Act is temporarily appointed to perform the duties and exercise the powers of manager.

(3) A small mine [4] shall be exempt from the provisions of this section, unless the inspector of the division, by notice in writing served on the owner or agent of the mine, requires that it be under the control of a manager, and in any mine so exempt in which a manager has not been appointed the powers and duties conferred or imposed on the manager shall be exercised and performed by the owner or agent, and anything by or under this Act required to be done by or to the manager shall be done by or to the owner or agent.

(4) The owner or agent of a mine required to be under the control of a manager shall not take any part in the technical [5] management of the mine unless he is qualified to be a manager.

(5) For the purpose of this section, workings having a common system of ventilation or any part of a system of ventilation in common shall be deemed to form part of the same mine.

[1] Owner and agent are defined by s. 122, *post*, p. 661.

Liability of Owners.—There have been in recent years several decisions of great importance as to the civil liability of owners (and incidentally of agents) in respect of breaches of statutory duties in the conduct and management of mines imposed by the provisions of the Coal Mines Regulation Act, 1887. These provisions were for the most part contained in the general rules of s. 49 and the special rules established under s. 51 of that Act. S. 49 provided that the general rules should be observed, "so far as is reasonably practicable in every mine," and s. 51 (2) provided that the special rules should be observed in and about every mine to which they applied, "in the same manner as if they were enacted in this Act."

In Bett *v.* Dalmeny Oil Co., 7 F. 787, an action was brought against an owner for breach of general rule 21 (reproduced by s. 49 of the present Act, *post*, p. 624) which directed the securing of roofs and sides. The owner had appointed a competent manager and had provided all materials necessary to comply with the rule. The Court held that the rule imposed an absolute duty upon the owner, similar to the duties held to be imposed by the Factory Acts in Groves *v.* Lord Wimborne, 1898, 2 Q. B. 402, and that the owner was therefore liable.

In Butler (or Black) *v.* Fife Coal Co., 1909, S. C. 152; 1912, A. C. 149, a

[New provisions are marked by a line.]

similar action was brought in respect of breaches of general rules 1, 4 and 7. Rule 1 provided that an adequate amount of ventilation should be produced in every mine to render harmless noxious gases to such an extent as to make the workings and roads fit for working and passing therein (see s. 29 of the present Act, *post*, p. 607). R. 4 directed that inspections of the condition of the mine should be made by competent persons appointed by the owner, agent, or manager (see s. 14 (1), ss. 63–66 of the present Act, *post*, pp. 631, 632). R. 7 provided that the person for the time being in charge of the mine should withdraw the workmen in case of danger (see s. 67 of the present Act, *post*, p. 632). An unusual danger existed in the mine, in the shape of escapes of carbon monoxide gas from an adjoining mine of the defendants. And the owners were "well aware that the particular coal measures there being worked were of a specially dangerous character owing to the occurrence of fires and the escape of noxious and deadly gases" (see *per* Lord Shaw, 1912, A. C., p. 170). The owners had appointed officials who were unaware of the existence of this danger, and had not the requisite knowledge to enable them to deal with it. It would, in fact, have been "practicable" for the owners to have caused such instruction to have been given to the officials as would have afforded them the requisite knowledge (1912, A. C. 168, 169, 177). It was held by the Second Division of the Court of Session that the rules in question in terms imposed duties on persons other than the owners, and that the latter having appointed competent persons to discharge these duties could not be made liable. While distinguishing Bett *v.* Dalmeny Oil Co. on this ground, the Court doubted the correctness of that decision. The House of Lords affirmed the proposition that the duty imposed upon the owners was not an absolute duty. They "could do no more than take due care to see that the people whom they employed were competent, and had qualifications adequate to meet the particular danger which they had to consider" (1912, A. C., p. 168). But the House overruled the decision of the Court of Session on the ground that, as the owners were aware of the special dangers existing in the mine, they ought to have appointed officials competent to meet such dangers, and that, having failed to do so, they were guilty of a breach of their statutory duty. Lord Shaw also considered the breach of rule 1 important (*ib.*, pp. 172, 173, 176). It is clear, however, that the duty to maintain ventilation is, as far as the owner is concerned, a qualified and not a direct duty. And unless the officials were incompetent to manage the ventilation, which does not appear to have been suggested, the owners could not be made liable for this particular breach. Cf. with this case Anderson *v.* Atkinson, 99 L. T. 22, cited s. 29, n. 1, *post*, p. 608, a criminal case in which the particular circumstances of the case increased the statutory obligations of an agent.

David *v.* Britannic Co., 1909, 2 K. B. 146; 1910, A. C. 74, was an action for damages for breach of the shot-firing provisions of general rule 12 (cf. s. 61 of the present Act, *post*, p. 629), and of certain special rules on the same subject. The general rules were not in terms imposed merely upon the persons firing the shots. The special rules placed a direct duty on the manager. Channell, J., held that the plaintiff could not succeed unless he proved, not only that a breach of the rule had been committed, but also that the owner had neglected to publish or enforce the rule. The C. A. by a majority directed a new trial. Cozens-Hardy, M.R., differed from the L.JJ. and agreed with Channell, J., as to the onus of proof. He held that all the provisions of the Act imposed duties on the owner; that some of these provisions imposed upon him a direct and absolute duty, others a qualified duty; that for breach of the former he was always liable, while for breach of the

latter he was not liable unless he failed to take all reasonable means to publish and enforce the provisions. Moulton, L.J., thought that the case was governed by Groves *v.* Wimborne, *supra*, and that all the provisions of the Act imposed absolute duties on the owner, who was liable in respect of every breach. Buckley, L.J., agreed with the M.R. as to the distinction between absolute and qualified duties, but held that the onus of proving that he had taken reasonable means of enforcing the provisions in the case of a breach of a qualified duty was upon the owner. There was a further difference of judicial opinion as to whether ss. 50 and 51 (3) applied to civil as well as to criminal cases. Having regard to the provisions of s. 102 of the present Act (*post*, pp. 654, 655) this distinction is immaterial.

The House of Lords affirmed the decision of the majority of the C. A., and ordered a new trial on the ground that Channell, J., had misdirected the jury as to the onus of proof, but both Lord Halsbury and Lord Gorrell disapproved of some of the reasons given by the C. A. Although their lordships did not specify which were the reasons, it is evident from the fact that they ordered a new trial instead of entering judgment for the plaintiff, that they dissented from the judgment of Moulton, L.J., and accepted the distinction between absolute and qualified duties. As to this see Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 160, 161. This case must, it is submitted, be taken to overrule Bett *v.* Dalmeny Oil Co. But see Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 163, 173, 174.

In Watkyns *v.* Naval Colliery, 1911, 2 K. B. 162, the action was based upon an alleged breach of general rule 30 and of certain special rules. R. 30, which is substantially reproduced by s. 40 (10) of the present Act (*post*, pp. 617, 618), directed that adequate brakes should be attached to winding engines. The owners appointed a competent manager and provided a brake and machinery, which he advised were adequate. They were not in fact adequate; and their inadequacy caused an accident. Pickford, J., held that the rules in question imposed absolute duties on the owners, and that they were liable. The C. A. held that the duty was not absolute, and that it had been discharged. The judges found the qualification of the duty in the words "as far as is reasonably practicable" in s. 49 (cf. s. 102 (3) and (8) of the present Act, *post*, pp. 654, 655), which Farwell, L.J., characterised as "a qualified distributive enactment," and which he stated also governed special rules established under s. 51. See also as to the effect of these words, Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 163. They also held that ss. 50 and 51 (3) had no civil application.

The scheme of the present Act differs from that of 1887. Many of the general rules are reproduced with additions and modifications by different sections of the Act. By ss. 86 and 87, *post*, pp. 644, 645, power is given to establish general and special regulations, which correspond roughly with general and special rules. S. 102 (3), *post*, p. 654, provides that no owner shall be criminally liable for the breach of any provision beyond his control and against the happening of which it was impracticable for him to make provision; and s. 102 (8) provides that no owner shall be civilly liable for any breach if it is shown that it was not reasonably practicable to avoid or prevent the breach. This section read in the light of the above decisions may be said to establish the following propositions:—

(1) Every provision relating to the management or conduct of a mine imposes a duty on the owner.

(2) Whether such duty is absolute or qualified depends on the terms of the provision and the circumstances of the case.

(3) If the duty is absolute, the liability of the owner in respect of its breach is absolute.

[New provisions are marked by a line.]

(4) If the duty is qualified, the owner will be liable in respect of its breach, unless he has taken all reasonable means to publish and enforce the provision imposing the duty.

(5) The onus of such proof is in all cases on the owner.

(6) In ordinary cases the owner discharges a qualified duty by publishing the provisions imposing it, appointing competent officials, and making adequate financial provisions for the observance of the provisions.

(7) The special circumstances of a particular case may increase the burden of a qualified duty.

(8) The tests for determining liability are the same in civil and criminal cases.

Where a breach of a statutory duty has been committed the owner cannot avail himself of the defence of common employment. Groves *v.* Lord Wimborne, 1898, 2 Q. B. 402; Bett *v.* Dalmeny Oil Co.; Butler (or Black) *v.* Fife Coal Co.; David *v.* Britannic Co.; and the maxim "volenti non fit injuria" has no application; Baddeley *v.* Granville, 19 Q. B. D. 423.

The breach by a workman of a statutory provision may amount to "serious and wilful misconduct" on his part within the meaning of the Workmen's Compensation Act, 1906: Dobson *v.* United Collieries, 8 F. 241; Praties *v.* Broxham Oil Co., 1907, s.c. 581; George *v.* Glasgow Coal Co., 1908, A. C. 123. Whether the breach does amount to such misconduct is a question of fact in each case: George *v.* Glasgow Co., at p. 128.

It is hardly necessary to observe that the breach of a statutory duty in the conduct of a mine does not affect the contractual liability of the purchasers of coal worked therefrom: Whiteman *v.* Sadler, 1910, A. C. 527.

As to the criminal liability of owners and agents, see further, ss. 75 and 102, *post*, pp. 635, 654.

[2] Under s. 20 of the Act of 1887 no liability was incurred by the owner or agent unless the mine had been worked for more than fourteen days without a manager being appointed, and they were not liable if they had taken all reasonable means to prevent a contravention of the section. Under the present section no working may take place unless there is a manager, and the liability of the owner and agent is unqualified.

[3] As to certificates, see ss. 7—13, *post*, pp. 590—595.

[4] A small mine is defined by s. 122 (*post*, p. 661) as one in which the total number of persons employed below ground does not exceed thirty.

[5] Technical is not defined by the Act; but it would probably be held to include the direction of all operations requiring engineering skill or affecting the safety of persons or animals employed in the mine. Unqualified owners and agents who took part in the technical management of a mine before the passing of this Act are permitted by s. 123, *post*, p. 662, to continue to take part in such management.

Daily supervision of mine by manager or under manager. [1887, s. 21.]

3.—(1) In every mine required to be under the control of a manager, daily personal supervision shall be exercised by the manager, and, where an under manager [1] has been appointed by the owner [2] or agent of the mine, also by that under manager.

(2) In cases where, on account of the absence of the manager or under manager on leave or from sickness or any other temporary cause, such daily personal supervision as is required by this section cannot be exercised, arrangements shall be made for the duties of

the manager or under manager, as the case may be, in respect of daily personal supervision being performed—

(*a*) in the absence of the manager, by the under manager, if any, or by a person not under the age of twenty-five years and holding a first or second-class certificate of competency under this Act,[3] appointed in writing by the owner or agent;

(*b*) in the absence of the under manager, in the case of a mine for which a separate under manager is required by this Act to be appointed, by a person not under the age of twenty-five years and holding a first or second-class certificate of competency under this Act [3] appointed as aforesaid:

And any person performing the duties of a manager or under manager whether under this or under the last preceding section, shall have the same responsibility, and shall be subject to the same liability, as the person whose duties he is performing.

(3) If in any mine there is a contravention of or non-compliance with the provisions of this section, the mine shall be deemed to be not managed in conformity with this Act.[4]

[1] The responsibility of the manager under s. 2 is not affected by the appointment of an under-manager or other certificated person, except in the cases mentioned in s. 3 (2).

[2] The owner is not liable if he has appointed a competent manager or under-manager unless he has acquiesced in the breach: Evans *v.* Small, 2 T. & R. 139, decided under s. 26 of the Act of 1872.

[3] See ss. 7—13, *post*, pp. 590—595.

[4] If a mine is not managed in conformity with the Act, the owner, agent and manager are each guilty of an offence against the Act; see s. 101 (2), *post*, p. 653.

Limitation of number of mines for which manager may act.

4.—(1) After the first day of January nineteen hundred and thirteen, no person who is the manager of a mine shall, without the approval of the inspector of the division, be the manager of any other mine required to be under the control of a manager, if the aggregate number of persons employed underground in the mine of which he is manager and that other mine exceeds one thousand, or if all the shafts or adits for the time being in use in working the mine of which he is manager and that other mine do not lie within a circle having a radius not exceeding two miles.

(2) Where any person is appointed to be the manager of two or more mines required to be under the control of a manager, a separate under manager shall be appointed for each mine.

(3) If it appears to the Secretary of State that the personal supervision and control exercised by the manager of any mine are insufficient, by reason of the person who is manager of that mine being

[New provisions are marked by a line.]

also manager of any one or more other mines, the Secretary of State may by order limit the number of such mines for which a person may act as manager.

If the owner, agent, or manager of the mine disputes the reasonableness of the order, the matter shall be settled in manner provided by this Act for settling disputes.[1]

(4) If any person acts in contravention of any such order, or connives at any such contravention, he shall be guilty of an offence against this Act.

[1] See s. 116, *post*, p. 659.

Qualifications of managers and under managers. [1887, ss. 20, 21.]

5.—(1) A person shall not be qualified to be appointed or to be manager of a mine required to be under the control of a manager,[1] unless he is at least twenty-five years of age and is for the time being registered as the holder of a first-class certificate of competency under this Act.[2]

(2) A person shall not be qualified to be appointed or to be an under manager of a mine, or manager of a mine which is not required to be under the control of a manager, unless he is for the time being registered as the holder of a first-class or a second-class certificate of competency under this Act.

[1] *I.e.* all mines except those in which less than thirty persons are employed below ground, and which are not required by an inspector to be under the control of a manager; see s. 2 (3), *ante*, p. 585.

[2] A manager lawfully acting as manager at the passing of this Act may continue so to act although he does not satisfy the requirements of this section; see s. 123 (*a*), *post*, p. 662.

Notification of name and address of manager, &c. [1887, s. 20.]

6. On the appointment in pursuance of this Act of a person to be manager or under manager of a mine, or to perform temporarily the duties of manager or under manager, the owner or agent shall send to the inspector of the division notice [1] of the name and address of that person and the number and class of the certificate held by him, and, if he fails to do so, he shall be guilty of an offence under this Act.

[1] As to service of notice on inspectors, see s. 120, *post*, p. 660.

Certificates of Competency.

Description of certificates of competency. [1887, s. 23 (1).]

7. There shall be two descriptions of certificates of competency under this Act (that is to say,)—

(1) first-class certificates;

(2) second-class certificates.

[New provisions are marked by a line.]

Constitution of Board for Mining Examinations. [1887, ss. 23, 24 (1), (3).]

8.—(1) For the purpose of ascertaining the fitness of applicants for certificates of competency under this Act, a Board, to be styled "The Board for Mining Examinations," shall be constituted by the Secretary of State, consisting of—

(*a*) six representatives of owners or agents of mines or managers of mines or mining engineers;

(*b*) six representatives of workmen employed in mines;

(*c*) the chief inspector and two divisional inspectors of mines; and

(*d*) two persons eminent in mining and scientific knowledge.

The members of the Board shall be appointed and may be removed by the Secretary of State, and shall hold office during his pleasure.

(2) The procedure of the Board shall be in accordance with rules made by the Board subject to the approval of the Secretary of State.

(3) The Board shall, at such intervals as the Secretary of State may determine, make to him a report of their proceedings and of such other matters as he may require.

Examinations for certificates. [1887, ss. 23 (1), 24 (2), 25, 26 (1).]

9.—(1) The Board for Mining Examinations shall hold examinations at such times and in such places as may be fixed by the Board subject to the approval of the Secretary of State.

(2) The Board may, subject to the approval of the Secretary of State, make rules for the conduct of the examinations and the qualifications of applicants for certificates of competency under this Act, and the rules shall amongst other things provide—

(*a*) that the examination and qualifications of applicants for second-class certificates shall be suitable for practical working miners; and

(*b*) that no person shall be qualified to be an applicant for a certificate unless he—

(i) is twenty-three years of age or upwards; and

(ii) has had such practical experience in mining (either in the United Kingdom or partly in the United Kingdom and partly elsewhere) as may be required by the rules for a period of not less than five years, or (in the case of an applicant who has received an approved diploma, or has taken an approved degree) of not less than three years; and

(iii) has given satisfactory evidence of his sobriety, experience, and general good conduct; and

(*c*) for the holding, as a part of the examination, of vivâ voce examinations in different localities with a view to the

practical knowledge of applicants for certificates in each locality being tested with reference to the local mining conditions, and for requiring at least one of the examiners in every vivâ voce examination to be a person possessing practical acquaintance with those conditions.

(3) The Board may, subject to the consent of the Secretary of State as to number, appoint, remove, and re-appoint examiners to conduct examinations.

(4) A person acting as examiner shall not take any part in the examination of the papers, or in the vivâ voce examination, of any applicant for a certificate whom he has in any way trained or instructed in any of the subjects of the examination.

(5) The remuneration to be paid to the examiners and the fees to be paid by applicants for certificates shall be such as the Secretary of State, with the consent of the Treasury, may determine.

(6) For the purposes of this section, "approved diploma" means a diploma in scientific and mining training after a course of study of at least two years at an institution approved by the Secretary of State, and "approved degree" means a degree of any University approved by the Secretary of State which involves training in and knowledge of scientific and mining subjects; and the approval of the Secretary of State may be given subject to such conditions as he may think fit, and may be revoked by him at any time.

Grant of certificates. [1887, s. 26.]

10.—(1) The Secretary of State shall deliver to every applicant who is duly reported by the Board for Mining Examinations to have passed the examination satisfactorily such a certificate of competency as the case requires.

(2) The Secretary of State may deliver such a certificate without examination to an applicant who is the holder of a certificate granted in any British possession or foreign country, if the Board report that the standard of training and examination required for the grant of such a certificate is equivalent to that required for the grant of a corresponding certificate under this Act.

(3) A register of the holders of certificates shall be kept by such person and in such manner as the Secretary of State directs.

Inquiry into competency of holders of certificates. [1887, ss. 27, 28.]

11.—(1) If at any time representation is made to the Secretary of State by an inspector or otherwise that any person holding a certificate of competency under this Act is, by reason of incompetency or gross negligence or misconduct in the capacity of, or while temporarily performing the duties of, manager or under manager of a mine, unfit to continue to hold a certificate of competency, or has been convicted of an offence against this Act or any enactment

[New provisions are marked by a line.]

repealed by this Act, the Secretary of State may, if he thinks fit, cause inquiry to be made into the conduct of that person, and with respect to every such inquiry the following provisions shall have effect :—

(*a*) The inquiry shall be public, and shall be held, at such place as the Secretary of State may appoint, by such county court judge, metropolitan police magistrate, stipendiary magistrate, or other person or persons (herein-after in this section referred to as the court) as may be directed by the Secretary of State, and either alone or with the assistance of any assessor or assessors named by the Secretary of State :

(*b*) The Secretary of State shall, before the commencement of the inquiry, furnish to the person into whose conduct inquiry is made a statement of the case on which the inquiry is instituted :

(*c*) The person into whose conduct inquiry is made may attend the inquiry by himself, his counsel, solicitor, or agent, and may, if he thinks fit, be sworn and examined as an ordinary witness in the case :

(*d*) The court shall, on the conclusion of the inquiry, send to the Secretary of State a report containing a full statement of the case, and the opinion of the court thereon, and such report of, or extracts from, the evidence as the court may think fit :

(*e*) The court shall have power to cancel or suspend the certificate of the person into whose conduct inquiry is made, if it finds that he is, by reason of incompetency, or of such gross negligence or misconduct as aforesaid, or of his having been convicted of an offence against this Act or any enactment repealed by this Act, unfit to continue to hold a certificate of competency :

(*f*) The court may require the person into whose conduct inquiry is made to deliver up his certificate. The court shall hold a certificate so delivered until the conclusion of the investigation, and shall then either restore, cancel, or suspend the certificate according to its judgment on the case :

(*g*) The court shall have, for the purpose of the inquiry, all the powers of a court of summary jurisdiction when acting as a court in hearing informations for offences against this Act, and all the powers of an inspector under this Act, and in addition the following powers :—

[New provisions are marked by a line.]

(i) power, by summons signed by the court, to require the attendance of all such persons as it thinks fit to summon and examine for the purpose of the inquiry, and for that purpose to require answers or returns to such inquiries as the court thinks fit to make;

(ii) power to require the production of all books, papers, and documents which the court considers important for the purpose of the inquiry:

(*h*) A person attending as a witness before the court shall be allowed such expenses as would be allowed to a witness attending on subpœna before a court of record; and in case of dispute as to the amount to be allowed, the same shall be referred by the court to a master of the Supreme Court, who, on request signed by the court, shall ascertain and certify the proper amount of such expenses.

(2) If any person without reasonable excuse (proof whereof shall lie on him) fails to comply with any summons or requisition of the court, or impedes the court in the execution of its duty, he shall be guilty of an offence against this Act, and a person who is guilty of any such offence shall, in addition to any other fine to which he is liable under this Act, be liable to a fine not exceeding one pound for every day during which the offence continues.

(3) The court may make such order as it thinks fit respecting the costs and expenses of the inquiry, and such order shall, on the application of any party entitled to the benefit thereof, be enforced by any court of summary jurisdiction as if such costs and expenses were a fine imposed by that court.

(4) The Secretary of State may, if he thinks fit, pay to the person or persons constituting the court, including any assessors, such remuneration as he may with the consent of the Treasury determine.

Provisions as to cancellation and suspension of certificates. [1887, s. 29.]

12.—(1) Where a certificate of competency under this Act is cancelled or suspended in pursuance of this Act, the Secretary of State shall cause the cancellation or suspension to be recorded in the register of holders of certificates.

(2) The Secretary of State may at any time, if it is shown to him to be just so to do, renew or restore, on such terms as he thinks fit, any certificate which has been cancelled or suspended in pursuance of this Act, and cause the renewal or restoration to be recorded in the register.

Copies of lost certificates. [1887, s. 30.]

13. Whenever any person proves to the satisfaction of the Secretary of State that he has, without fault on his part, lost or been deprived of any certificate granted to him under this Act, the Secretary of

State shall, on payment of such fee, if any, as he may prescribe, cause a copy of the certificate to which the applicant appears by the register to be entitled, to be made out, and certified by the person who keeps the register, and delivered to the applicant; and any copy which purports to be so made and certified as aforesaid shall have all the effect of the original certificate.

Firemen, Examiners, and Deputies.

Appointment of firemen, examiners, and deputies. [1887, s. 49, r. 4.]

14.—(1) For every mine there shall be appointed by the manager in writing one or more competent persons (herein-after referred to as firemen, examiners or deputies) to make such inspections and carry out such other duties as to the presence of gas, ventilation, state of roof and sides, and general safety (including the checking and recording of the number of persons under his charge) as are required by this Act and the regulations [1] of the mine.

(2) A fireman, examiner, or deputy shall be required to devote his whole time to such duties as aforesaid (herein-after referred to as his statutory duties), but this provision shall not apply in the case of a fireman, examiner, or deputy in—

(*a*) any mine in which the total number of persons employed below ground at one time does not exceed thirty; or

(*b*) any mine in the counties of Durham or Northumberland; or

(*c*) any mine exempted by the inspector of the division on the ground of the special circumstances of the mine;

and nothing in this provision shall prevent any fireman, examiner, or deputy in any mine being employed in measuring the work done by persons in his district, or in firing shots in his district:

Provided that any duties assigned to or undertaken by any fireman, examiner, or deputy in addition to his statutory duties shall not be such as to prevent him carrying out his statutory duties in a thorough manner; and, if any question arises whether any additional duties are such as to prevent him carrying out his statutory duties in a thorough manner, that question shall be decided by the inspector of the division, whose decision shall be final.

(3) The district of a mine assigned to a fireman, examiner, or deputy shall not be of such a size as would prevent him from carrying out in a thorough manner all his statutory duties.[2]

(4) A mine in which there is a contravention of this section shall be deemed not to be managed in conformity with this Act.

[1] The making of general and special regulations is provided for by ss. 86 and 87, *post*, pp. 644, 645.

[2] The determination of the size of such district does not appear to rest with the inspector; and could only be decided upon a prosecution under subs. 4.

[New provisions are marked by a line.]

Qualifications of firemen, examiners, and deputies.

15.—(1) A person shall not, after the first day of January nineteen hundred and thirteen, be qualified to be appointed or to be a fireman, examiner, or deputy unless he—

(*a*) is the holder of a first or second-class certificate of competency under this Act or is twenty-five years of age or upwards and has had at least five years' practical experience underground in a mine, of which not less than two years have been at the face of the workings of a mine; and

(*b*) has obtained a certificate in the prescribed form from a mining school or other institution or authority approved by the Secretary of State as to his ability to make accurate tests (so far as practicable with a safety lamp) for inflammable gas, and to measure the quantity of air in an air current,[1] and that his hearing is such as to enable him to carry out his duties efficiently; and

(*c*) has, within the preceding five years, obtained from such approved school, institution, or authority as aforesaid, or from a duly qualified medical practitioner, a certificate in the prescribed form to the effect that his eyesight is such as to enable him to make accurate tests for inflammable gas[2] and that his hearing is such as to enable him to carry out his duties efficiently, the expense of obtaining which shall, in the case of a person employed at the time as fireman, examiner, or deputy, be borne by the owner of the mine:

Provided that a person shall not be required to have obtained a certificate as to ability to make tests for inflammable gas or as to eyesight, if he is employed in a mine in which inflammable gas is unknown.

(2) The certificate as to the eyesight and hearing of a fireman, examiner, or deputy employed in a mine shall, whilst he is so employed, be kept at the office at the mine, and, whenever a requisition in that behalf is made by an inspector, produced for his inspection.

[1] Any person employed as a fireman, examiner, or deputy at the passing of this Act may continue to be so employed without a certificate of his ability to measure the quantity of air in an air current; see s. 123, *post*, p. 662.

[2] It is understood that the use of glasses will not necessarily preclude a person from obtaining a certificate.

Inspections on behalf of Workmen.

Periodical inspection on behalf of workman. [1887, s. 49, r. 38.]

16.—(1) The workmen employed in a mine may, at their own cost, appoint two of their number or any two persons, not being mining engineers, who are or who have been practical working miners and have had not less than five years' experience of

underground work, to inspect the mine, and the persons so appointed shall be allowed once at least in every month,[1] accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officials of the mine, to go to every part of the mine, and to inspect the shafts, roads, levels, workings, air-ways, ventilating apparatus, old workings, and machinery, and shall, where an accident has occurred in a mine of which notice[2] is required under this Act to be given, be allowed to go together with any person acting as legal adviser to the workmen,[3] or with a mining or electrical engineer selected by the workmen, accompanied as aforesaid, to the place where the accident occurred, and to make such inspection as may be necessary for ascertaining the cause of the accident, subject, however, to the provisions of this Act requiring the place where an accident has occurred to be left as it was immediately after the accident.[4]

(2) Every facility shall be afforded by the owner, agent, and manager and all persons in the mine for the purpose of the inspection, and the manager shall on demand produce to the persons appointed the certificates of all firemen, examiners, or deputies employed in the mine, and the persons appointed shall, except where the inspection is an inspection for the purpose of ascertaining the cause of an accident, forthwith make and sign a full and accurate report of the result of the inspection in a book to be kept at the mine for the purpose ; and the owner agent or manager shall forthwith cause a true copy of the report to be sent to the inspector of the division.

(3) If the owner, agent, or manager, or any other person refuses or neglects to afford such facilities as aforesaid, or if the manager fails to produce the certificates of the firemen, examiners, or deputies, or if the owner, agent, or manager fails to send a true copy of the report in accordance with this section, he shall be guilty of an offence against this Act.

[1] This section only imposes an obligation to allow one inspection a month. Further inspections are an act of grace on the part of the management.

[2] These accidents are defined by ss. 80 and 81, *post*, pp. 639—641.

[3] The legal adviser authorised to inspect is a representative of the workman employed in the mine.

[4] See s. 80, *post*, pp. 639, 640.

Returns, Plans, Notices and Books.

Reports by persons having responsible duties.

17.—(1) In addition to the reports specially required by this Act, it shall be the duty of every person on whom responsible duties are imposed with respect to safety or to the condition of the roadways, workings, ventilation, machinery, shafts, shot-firing, safety lamps, electrical plant, or animals at a mine, and who shall be required to do so by the regulations of the mine, to make, at such intervals as

[New provisions are marked by a line.]

may be fixed by the regulations of the mine in a book to be kept at the mine, full and accurate reports of the matters falling within the scope of his duties.

(2) Copies of the reports required to be made under the last preceding section and under the provisions of this Act relating to inspections before commencing work [1] and inspections during shifts [2] shall be posted up at the pit head, not later than ten o'clock in the morning on the day following the day on which the reports are made, and remain posted until ten o'clock in the morning on the following day.

[1] See s. 64, *post*, p. 631.
[2] See s. 65, *post*, p. 632.

Returns by owner, agent, or manager of mine. [1887, s. 33. 1906, s. 1.]

18.—(1) On or before the twenty-first day of January in every year, the owner,[1] agent, or manager of every [2] mine shall send to the inspector of the division a correct return, specifying, with respect to the year ending on the preceding thirty-first day of December—

(*a*) the particulars contained in the form [3] in the First Schedule to this Act, or in such other form as may, from time to time, be prescribed in lieu of that form;

(*b*) such particulars as may be prescribed of all accidents which occurred in or about the mine during the year to which the return relates and disabled, for more than seven days, any person employed in or about the mine from working at his ordinary work;

(*c*) such particulars as may be prescribed as to the supply and maintenance with respect to the mine of appliances for use in rescue work and ambulance appliances, the formation and training of rescue brigades, and the training of men in ambulance work; and

(*d*) such other particulars as the Secretary of State may prescribe by order made in like manner and subject to the like procedure as general regulations [4] under this Act.

(2) Forms for the purpose of the returns required by this section shall, on application, be furnished by the inspector of the division.

(3) The Secretary of State may publish the aggregate results of the returns made under this section with respect to any particular county or inspector's division, or any large portion of a county or inspector's division, and so much of any individual return as does not relate to the quantity or value of mineral gotten, but the portion of any individual return relating to the quantity or value of mineral gotten shall not be published without the consent of the owner of the mine to which it relates; and no person, except an inspector

[New provisions are marked by a line.]

or the Secretary of State or any body of commissioners incorporated by Act of Parliament for the drainage of mines, and authorised to assess and levy rates in respect of minerals gotten from such mines, shall be entitled, without such consent, to see such portion as aforesaid of any individual return.

(4) Every owner, agent, or manager of a mine who fails to comply with this section, or makes any return which is to his knowledge false in any particular, shall be guilty of an offence against this Act.

[1] Subs. (1) imposes a direct duty upon the owner: David *v.* Britannic Co., 1909, 2 K. B. 153, 154, *per* Cozens-Hardy, M.R., as to s. 33 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] It is to be observed that a full form must be filled up in respect of every mine, and that no exemption is granted under the present section in respect of mines not employing more than thirty-six persons.

[3] The form of return comprises, as under the Act of 1887, particulars of the owner, manager, and under-manager, the persons employed, the quantity of minerals gotten, and the number of working days and particulars of ventilation. But it also includes particulars of explosives, coal-cutting machines, conveyors, and safety lamps, and of the type and aggregate horse-power of electrical apparatus. The form is given, *post*, pp. 665–670.

The owner must also furnish particulars of the number of horses used in the mine, and of the deaths of or accidents or injury to such horses; see Sched. III., cl. 13, *post*, p. 674.

[4] The procedure for making general regulations is contained in s. 86, and Sched. II., Part I., *post*, pp. 671, 672.

Notices of opening and abandonment of mine. [1887, s. 36.]

19. In any of the following cases, namely,

(i) Where any working is commenced for the purpose of opening a new shaft, outlet, or seam of any mine;

(ii) Where a shaft, outlet, or seam of any mine is abandoned or the working thereof discontinued;

(iii) Where the working of a shaft outlet or seam of any mine is recommenced after any abandonment or discontinuance for a period exceeding two months; or

(iv) Where any change occurs in the name of any mine, or in the name of the owner or agent of any mine, or in the principal officers of any company which is the owner of a mine;

the owner, agent, or manager of the mine shall give notice [1] thereof to the inspector of the division within two months after the commencement, abandonment, discontinuance, recommencement, or change, and, if such notice is not given, the owner, agent, or manager shall be guilty of an offence against this Act.

[1] As to service of such notices, see s. 120, *post*, p. 660.

[New provisions are marked by a line.]

Plans of mine and ventilation. [1887, s. 34. 1896, s. 3.]

20.—(1) The owner,[1] agent, or manager of every mine shall keep in the office at the mine [2]—

(i) an accurate plan of the workings of the mine, up to a date not more than three months previously, showing—

(*a*) the boundaries of the mine, where possible, and the position of the workings with regard to the surface and variations of level on the roadways from the Ordnance basis, being variations of ten feet or any multiple of ten feet; and

(*b*) the general direction and rate of dip of the strata; and

(*c*) the position, direction, and extent of every known fault of every seam with its vertical throw, and of every known washout and intrusive dyke; and

(*d*) the depth of every shaft; and

(ii) a section of the strata sunk through, or, if that is not reasonably practicable, a section of every seam.

(2) The owner, agent, or manager of every mine shall also keep in the office at the mine [2] a separate plan showing the system of ventilation in the mine, and in particular the general direction of the currents, the points where the quantity of air is measured, and the principal devices for the regulation and distribution of the air, and on every such plan the intake airways shall be coloured blue and the return airways red.

(3) Every such plan must be on a scale of not less than forty inches to the mile, and must be prepared by or under the supervision of a surveyor possessing the prescribed qualifications,[3] and shall be of a durable character:

Provided that, in the case of a mine opened before the passing of this Act, it shall be sufficient if the scale of the plan is not less than the Ordnance scale of twenty-five inches to the mile.[4]

(4) The owner, agent, or manager of the mine shall, on request at any time of an inspector, produce to him at the office at the mine such plans and section, and shall also, on the like request, mark on such plans the then state of the workings of the mine as respects the particulars required to be shown on the plan under subsection (1) of this section; and the inspector shall be entitled to examine the plans and section, and, for official purposes only, to make a copy of any part thereof.

(5) If the owner, agent, or manager of any mine fails to keep, or wilfully refuses to produce or allow to be examined or copied, any such plan or section, or wilfully withholds any portion thereof, or wilfully refuses, on request, to mark thereon the state of the

[New provisions are marked by a line.]

workings of the mine, or conceals any part of those workings, or produces an imperfect or inaccurate plan or section, he shall (unless he shows that he was ignorant of the concealment, imperfection, or inaccuracy) be guilty of an offence against this Act.

Further, the inspector may, by notice in writing (whether a penalty for the offence has or has not been inflicted), require the owner, agent, or manager to cause an accurate plan and sections, showing the particulars herein-before required, to be made within a reasonable time at the expense of the owner of the mine in accordance with the provisions herein-before contained, and, if the owner, agent, or manager fails within twenty days after the requisition of the inspector or within such further time as may be allowed by the Secretary of State, to cause such plan and section to be made as hereby required, he shall be guilty of an offence against this Act.

[1] This section imposes a direct duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. 153, 154, *per* Cozens-Hardy, M.R., as to s. 34 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] *I.e.* an office on the surface of the mine; see s. 122, *post*, p. 661.

[3] No qualifications are prescribed by the Act, but the Secretary of State has power to determine such qualification by means of general regulations. See s. 86, *post*, p. 644.

[4] S. 34 (3) of the Act of 1887 provided that every plan should be on a scale of not less than twenty-five inches to the mile, or on the same scale as the plan for the time being in use at the mine. The latter alternative is no longer permitted.

Plans of abandoned mines. [1887, s. 38. 1896, s. 4.]

21.—(1) Where any mine or seam is abandoned, the person who is owner [1] of the mine or seam at the time of its abandonment shall, within three months after the abandonment, send to the Secretary of State:

(i) An accurate plan of the mine or seam showing—

(*a*) the boundaries of the workings of the mine or seam, including not only the working faces but also all headings in advance thereof, up to the time of the abandonment;

(*b*) the pillars of coal or other mineral remaining unworked;

(*c*) the position, direction, and extent of every known fault of every seam in the mine or of the seam, as the case may be, with its vertical throw and of every known washout and intrusive dyke;

(*d*) the position of the workings with regard to the surface;

(*e*) the general direction and rate of dip of the strata; and

[New provisions are marked by a line.]

(*f*) the depth of every shaft or, in the case of an abandoned seam, the depth of every shaft from the surface to that seam; and

(ii) A section of the strata sunk through, or, if that is not reasonably practicable, a section of every seam in the mine or of the seam, as the case may be.

(2) Every such plan must be on a scale of not less than that of the Ordnance Survey of twenty-five inches to the mile in the case of a mine opened before the passing of this Act, and on a scale of not less than forty inches to the mile in the case of a mine opened after the passing of this Act, and its accuracy must be certified, so far as is reasonably practicable, by a surveyor possessing the prescribed qualifications,[2] and it shall be of a durable character:

Provided that the foregoing requirement as to the scale of the plan shall not apply as respects any workings plotted before the commencement of this Act.

(3) The plan and section shall be preserved under the care of the Secretary of State:

Provided that, if an abandoned mine or seam is re-opened, the owner shall be entitled to have the plan and section returned to him on depositing with the Secretary of State a copy of the plan and section, or of such portions thereof as the Secretary of State may require, certified to be correct by a competent draftsman.

(4) No person except an inspector shall be entitled, without the consent of the owner for the time being of the mine or seam, or a licence of the Secretary of State, to see the plan or section whilst preserved as aforesaid until after the expiration of ten years from the time of the abandonment, but such licence shall not be granted, unless the Secretary of State is satisfied that the inspection of such plan is necessary in the interests of safety.

(5) Where a mine or seam has not been worked for a period of twelve months, it shall be deemed for the purposes of this Act to have been abandoned unless the roadways and workings of the mine or seam are maintained in an accessible condition.

(6) If the owner of a mine or seam fails to comply with this section, he shall be guilty of an offence against this Act.

(7) A complaint or information for an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens.[3]

(8) The High Court may, on application by or on behalf of the Secretary of State, make an order requiring any person who has,

[New provisions are marked by a line.]

for the time being, the custody or possession of any plan or section of an abandoned mine or seam to produce it to the Secretary of State for the purpose of inspection or copying.

[1] Subs. (1) imposes a direct duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. 154, *per* Cozens-Hardy, M.R., as to s. 38 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] See note 3 to the last section.

[3] An information preferred after the expiration of six months after service of a notice is out of time: Stokes *v.* Hill, 1901, 1 K. B. 493, decided under s. 38 of the Act of 1887. A notice merely referring to the requirements of the section, and requesting attention to the matter, is sufficient: *ib.*

Returns as to abandonment of mines. [1887, s. 38 (3).]

22. Where any mine is abandoned, the person who is owner [1] of the mine at the time of its abandonment shall, within three months of the abandonment, send to the inspector of the division a correct return specifying, with respect to the period which has elapsed since the expiration of the year covered by the last annual return made under this Act, the particulars required in that return, except those required under Parts B. and D. of the First Schedule to this Act; and the provisions of this Act with respect to the said annual return shall apply to the return so sent.[2]

[1] This section imposes a direct duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. 154, *per* Cozens-Hardy, M.R., as to s. 38 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] As to the particulars required, see s. 18, *ante*, pp. 598, 599. The particulars not required are those as to ventilation and electrical apparatus, *post*, pp. 668, 670.

Power of Secretary of State to have new plans prepared.

23. If it appears to the Secretary of State that any plan or section required by this Act to be kept in the office at a mine or to be sent to the Secretary of State is inaccurate, and that in the interests of safety it is desirable to have a new plan or section prepared, he may appoint a surveyor to make such new plan or section, and a surveyor so appointed shall be afforded by the owner, agent, or manager all necessary facilities for the purpose of making such plan or section, and if, on the making of such new plan or section, it appears that the original plan or section was inaccurate in any material particular, the cost of making the new plan or section, or such proportion thereof as the Secretary of State thinks fit, shall be defrayed by the owner of the mine or, as the case may require, the person who was at the time of its abandonment the owner of the mine or seam, and recoverable from him as a debt to the Crown.[1]

[1] It is not clear how in case of a dispute, the question whether a plan or section is materially inaccurate is to be determined. Although the Secretary of State has an absolute discretion as to determining the proportion of the cost of the plan or section to be borne by the owner if the latter is liable,

[New provisions are marked by a line.]

the determination of his liability does not rest with the Secretary of State. This it would appear can only be decided in proceedings to recover the cost, which as a Crown debt is recoverable by an information in the K. B. D.

Books and copies thereof. [1887, s. 49, r. 37.]

24.—(1) All such books as are by this Act required to be kept at a mine shall be provided by the owner, agent, or manager, and shall be in the prescribed form, and the books, or a correct copy thereof, shall be kept at the office at the mine and any inspector, and any person employed in the mine or anyone having the written authority of any inspector or person so employed, may, at all reasonable times, inspect and take copies of and extracts from any such books; but nothing in this Act shall be construed to impose the obligation of keeping any such book or a copy thereof for more than twelve months after the book has ceased to be used for entries therein under this Act.

(2) Every report required by this Act to be recorded in a book kept at the mine for the purpose shall be submitted to the manager and under-manager, if any, of the mine, or, in the absence of the manager or under-manager, to the person performing the duties of manager or under-manager, as the case may be, in pursuance of the foregoing provisions of this Act, and shall be countersigned by them on the day on which the report is made or the day following.

(3) Any mine in which there is a contravention of or non-compliance with the provisions of this section shall be deemed to be not managed in conformity with this Act.

Miscellaneous.

Division of mine into parts. [1887, s. 19.]

25.—(1) Where two or more parts of a mine are worked separately, the owner, agent, or manager of the mine may give notice in writing to that effect to the inspector of the division, and thereupon each such part shall, for all the purposes of this Act, be deemed to be a separate mine: [1]

Provided that, where each of such parts of a mine has not a separate system of ventilation, a mine shall not be so divided, except with the permission of the inspector of the division and subject to such conditions as he may prescribe.[2]

(2) Every notice given under the foregoing provision must specify the points of separation on all roads connecting the different parts of the mine.

(3) If the Secretary of State is of opinion that the division of a mine in pursuance of this section tends to lead to evasion of the provisions of this Act, or otherwise to prevent the carrying of this Act into effect, he may object to the division by notice served on the

owner agent or manager of the mine; and, if the owner, agent, or manager refuses to acquiesce in such objection, the matter shall be determined in manner provided by this Act for settling disputes.[3]

[1] Until a mine has been divided under this section all the seams constitute one mine for the purposes of this Act: Thorpe *v.* Davies, 1908, 2 K. B. 750, 753, *post*, p. 680.

[2] This discretion is not affected by subs. (2).

[3] See s. 116, *post*, p. 659.

Fencing in case of abandoned mine. [1887, s. 37.]

26.—(1) Where any mine is abandoned or the working thereof discontinued, at whatever time the abandonment or discontinuance occurred,[1] it shall be the duty of the owner[2] thereof, and of every other person interested in the minerals of the mine,[3] to cause the top or entrance of every shaft and outlet to be kept surrounded by a structure of a permanent character sufficient to prevent accidents:[4]

Provided that—

(i) Subject to any contract to the contrary, the owner of the mine shall, as between himself and any other person interested in the minerals of the mine, be liable to carry this section into effect, and to pay any costs, charges and expenses incurred by any other person interested in the minerals of the mine in carrying this section into effect:

(ii) Nothing in this section shall exempt any person from any liability under any other Act, or otherwise.

(2) No person shall be precluded by any agreement or otherwise from doing, or be liable to any injunction, damages, penalty, or forfeiture in respect of, such acts as may be necessary in order to comply with the provisions of this section.

(3) Any shaft or outlet which is not kept surrounded by a structure as required by this section shall be deemed to be a nuisance within the meaning of section ninety-one of the Public Health Act, 1875.[5] 38 & 39 Vict. c. 55.

[1] The enactment therefore applies to mines abandoned or discontinued before the commencement of the Act: Stott *v.* Dickinson, 34 L. T., N. S. 291, decided under the Coal Mines Regulation Act of 1872. The corresponding provision in 23 & 24 Vict. c. 151, s. 21, did not apply to mines previously abandoned: R. *v.* Gratrex, 12 Cox, C. C. 157.

[2] This section imposes a direct duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. 154, *per* Cozens-Hardy, M.R., as to s. 37 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[3] As to the meaning of "mine," see s. 122, *post*, p. 660, and cases cited *post*, p. 78, n. 2, all of which (except R. *v.* Brown) were cases as to fencing. Lessors, to whom royalties are reserved, with powers of distress and entry, although not "owners," are "persons interested in the minerals:" Evans *v.* Mostyn, 2 C. P. D. 547. The words "other persons interested in the minerals" refer to persons having a present interest; and do not refer to

persons having a remote interest, or an interest arising merely from contract, or to trustees or cestuis que trust : *ib.* See, further, *post*, p. 661, n. 2.

[4] Cf. Met. Mines Act, 1872, s. 13, n. 3, *post*, p. 705.

[5] The effect of this subsection is to constitute such a shaft or outlet a nuisance liable to be summarily dealt with under the Public Health Act, 1875, as to which see ss. 91—111 of that Act.

Special provisions as to mines worked by contractor. [1887, s. 22.]

27.—(1) In every mine the materials required for the support of the roofs and sides shall be provided by and at the cost of the owner of the mine, and the firemen, examiners, or deputies and all other officials of the mine shall be appointed, and their wages paid, by the owner, notwithstanding that the mine or any part thereof is worked, or any part of the operations therein is carried on, by a contractor, and no such contractor, nor any person employed by him, shall be appointed to be manager, under-manager, or fireman, examiner, or deputy of the mine.[1]

(2) Where under any contract existing at the passing of this Act the materials required for the support of the roof or sides are to be provided, or the wages of any official are to be paid, by any person other than the owner, the owner may apply to the county court [2] of the district in which the mine is situate, and the court may make such variation in the terms of the contract as appears to the court just and equitable under the circumstances of the case, or in the alternative the court may, at the request of the owner, determine the contract.

(3) Any mine in which there is a contravention of or non-compliance with the provisions of this section shall be deemed to be not managed in conformity with this Act.

[1] The provisions of this section are directed against the charter-master or batty system (see pp. 69—71 of the Second Reference of the Royal Commission on Mines). Under the Act of 1887 the contractor and his employees were ineligible for the post of manager or under-manager. The present section further disqualifies them from becoming firemen, examiners, or deputies.

[2] The costs of such an application will be in the discretion of the Court : County Courts Act, 1888, s. 113.

Penalty for forgery of, or false declaration as to certificate. [1887, s. 32.]

28. Every person who commits any of the following offences ; that is to say,

(1) Forges or counterfeits any certificate of competency or other certificate granted under this Act or any Act repealed by this Act, or any official copy of any such certificate ; or

(2) Knowingly utters or uses any such certificate or copy which has been forged or counterfeited or contains any false statement ; or

(3) For the purpose of obtaining, for himself or any other person,

[New provisions are marked by a line.]

employment as a manager or under-manager or in any other capacity, or the grant renewal or restoration of any such certificate as aforesaid, or a copy thereof, either

(*a*) makes or gives any declaration, representation, statement, or evidence which is false in any particular; or

(*b*) knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same; or

(4) Knowingly makes any false statement in any report or entry required under this Act to be recorded in a book kept at the mine;

shall be guilty of a misdemeanour, and be liable on conviction to imprisonment, with or without hard labour, for a term not exceeding two years.

Part II.

Provisions as to Safety.

Ventilation.

Standard of ventilation. [1887, s. 49, r. 1.]

29.—(1) An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, levels, stables, and workings of the mine shall be in a fit state for working and passing therein, and in particular that the intake airways up to within one hundred yards of the first working-place at the working-face which the air enters shall be normally kept free from inflammable gas.

Provided always that—

(*a*) an abandoned road or level not used in connexion with the working of the mine shall, if properly fenced off, not be deemed to be a road or level within the meaning of this section; and

(*b*) no person shall be liable in respect of any contravention of or failure to comply with the provisions of this section if he shows that the ventilation was interrupted in consequence of an accident, and that no persons were employed in any part of the mine in which an adequate amount of ventilation was not being produced, except

[New provisions are marked by a line.]

such persons as it was necessary to employ in that part of the mine for the purpose of restoring the ventilation.[1]

(2) In every mine the quantity of air in the main current and in every split and at such points as may be determined by the regulations of the mine shall, at least once in every month, be measured and entered in a book to be kept for the purpose at the mine.

(3) For the purposes of this section, a place shall not be deemed to be in a fit state for working or passing therein if the air contains either less than nineteen per cent. of oxygen or more than one-and-a-quarter per cent. of carbon dioxide, and an intake airway shall not be deemed to be normally kept free from inflammable gas if the average percentage of inflammable gas found in six samples of air taken by an inspector in the air current in that airway at intervals of not less than a fortnight exceeds one quarter :

Provided that, in case of a mine which is liable to spontaneous combustion of coal, a place shall be deemed to be in a fit state for working or passing therein, notwithstanding that the air contains either less than nineteen per cent. of oxygen or more than one and a quarter per cent. of carbon dioxide, if the mine has been exempted by order of the Secretary of State, and the conditions on which the exemption is granted are complied with.

[1] The provisions of the present section are stricter than those of the corresponding rule in the Act of 1887 (s. 49, r. 1). Thus the intake airways are subject to a special provision, the measurement and record of air is no longer confined to the main current and split, and subs. (3) is added.

Ventilation must continue even during the temporary suspension of work as on Sundays : Knowles *v.* Dickinson, 2 E. & E. 705, a decision under a previous Act. It must not be confined to the working places and travelling roads, but must be extended to the contiguous parts of the mine, even though not in use, unless they are properly fenced off. The enactment requires so much of the mine to be ventilated as is necessary to render the working places and travelling roads safe : Brough *v.* Homfray, L. R. 3 Q. B. 771, decided under a previous Act.

The provisions of the section, it is submitted, impose a qualified duty on the owner and agent : Stokes *v.* Mitcheson, 1902, 1 K. B. 857 ; Anderson *v.* Atkinson, 99 L. T. 22 ; and see s. 2, n. 1, *ante*, p. 586. But this duty may be enlarged by the special circumstances of the case. Thus in Anderson *v.* Atkinson an agent was convicted under s. 49, r. 1, and s. 50 (now s. 75) of the Act of 1887 under the following circumstances. A clear breach of the rule occurred in a fiery mine, where exceptional care as to ventilation was required, owing apparently to a defective brattice which could and ought to have been remedied. A manager and under-manager had been appointed, and the rules had been published. For some months prior to the date of the breach the manager had been ill and unable to descend the mine or discharge his duties. During this time the agent had been constantly conferring with the under-manager and his assistant, but he had not been down the pit for more than three months. Although it was the duty of the overmen to see to the putting up of brattices, the JJ. found that the agent had not taken

[New provisions are marked by a line.]

all reasonable steps to enforce the rule, and the Divisional Court upheld the conviction. See, too, Wynne *v.* Forrester, 48 L. J. M. C. 140, decided under the Act of 1872, and *post*, pp. 635, 636; Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 149; and s. 2, note 1, *ante*, p. 585.

A manager may be convicted in respect of improper ventilation if it can be shown that he might have improved the ventilation by the means provided by his employer: Hall *v.* Hopwood, 49 L. J. M. C. 17; and see s. 75, n. 3, *post*, p. 636.

It has been held in Scotland, that a complaint with regard to a breach of the corresponding provision of the Act of 1887 must state in what particulars the system of ventilation in use in the mine is defective: Roberts *v.* Atkinson, 18 R. Just. Cas. 8.

Classification of mines for purposes of ventilation.

30.—(1) General regulations under this Act shall provide for the classification of mines according to the amount of the inflammable and noxious gases in the main return airway, and the amount of air passing into a mine shall not be less than such amount as may be prescribed by the general regulations as respects mines of the class to which the mine belongs.

(2) The obligation imposed by this section shall be in addition to, and not in substitution for, the obligation to provide an adequate amount of ventilation imposed by the last foregoing section.

Requirements as to the use of certain methods of ventilation. [1887, s. 49, rr. 2 & 3.]

31.—(1) Where a fire is used for ventilation in any mine, the return air shall be carried off clear of the fire by means of a dumb drift or airway, unless the mine is one in which inflammable gas is unknown.[1]

(2) Where a mechanical contrivance for ventilation is used at any mine, it shall not be placed beneath the surface:

Provided that this provision shall not be construed as preventing mechanical contrivances for ventilation being placed underground either—

(*a*) when such contrivances are auxiliary only and the contrivance whereby the main ventilation is produced is placed on the surface and is capable of producing such amount of ventilation as, in an emergency, would be sufficient for the safety of the persons employed underground; or

(*b*) when such contrivances afford a complete additional system of ventilation, and when a complete ventilating appliance is provided on the surface capable of producing such sufficient amount of ventilation as aforesaid and immediately available for use in the event of accident, and is kept in an effective condition and is used once at least in each week.

(3) After the first day of January, nineteen hundred and thirteen, or such later date as, in view of the circumstances of the mine, may be fixed by the inspector of the division, there shall, in every mine in which a mechanical contrivance for ventilation is used, be provided

[New provisions are marked by a line.]

and maintained in a condition to be put into immediate operation adequate means for reversing the air current.

(4) No fire shall be used below ground for ventilation in any mine or seam newly opened after the passing of this Act,[2] except in the case of a small mine,[3] in which the upcast shaft contains no inflammable material.

[1] These words are substituted for the words "unless it (the return air) be so diluted as not to be inflammable" in the corresponding rule (r. 2) under the Act of 1887.

[2] Subss. (2), (3), and (4) replace r. 3 of s. 49 of the Act of 1887. The effect of these sections is that every mechanical contrivance for ventilation must be such that the air current can be reversed and that no form of ventilation other than a mechanical contrivance can now be introduced into a mine opened after the passing of the Act. The previous rule is, however, modified in one respect, namely, that an auxiliary appliance can now be introduced underground, provided effective measures are taken to prevent the possibility of the air-current becoming short-circuited.

[3] See s. 122, *post*, p. 661.

Safety Lamps.

Use of safety lamps in certain places. [1887, s. 49, r. 8.]

32.—(1) No lamp or light other than a locked safety lamp shall be allowed or used—

(*a*) in any seam, where the air current in the return airway from any ventilating district in the seam is found normally to contain more than one half per cent. of inflammable gas; or

(*b*) in any seam (except in the main intake airways within two hundred yards from the shaft) in which an explosion of inflammable gas causing any personal injury whatever has occurred within the previous twelve months, unless an exemption is given by the Secretary of State on the ground that, on account of the special character of the mine, the use of safety lamps is not required;

(*c*) in any place in a mine in which there is likely to be any such quantity of inflammable gas as to render the use of naked lights dangerous;

(*d*) in any working near to or approaching a place in which there is likely to be an accumulation of inflammable gas;

(*e*) in any place where the use of safety lamps is required by the regulations of the mine:

Provided that—

(i) subject always to the provisions of this Act[1] and any regulations made thereunder as to the use of electricity in mines, electric lamps, if enclosed in airtight fittings and having the lamp globes hermetically sealed, may be used on main haulage roads or elsewhere within such

[New provisions are marked by a line.]

limits as may be fixed by the regulations of the mine; and

(ii) for the purpose of paragraph (*b*) of this subsection an explosion occurring before the commencement of this Act shall not be taken into account.

(2) Where, in pursuance of this Act or the regulations of the mine, the use of safety lamps has been introduced in any part of a ventilating district,[2] it shall not be lawful to use naked lights in any other part of the same ventilating district situated between the place where such lamps are used and the return airway, except when the use of safety lamps in that part of the district was introduced as a temporary precaution, and the conditions are not such as to render necessary the introduction of the use of safety lamps throughout the district.

(3) Where, in pursuance of this Act or the regulations of the mine the use of safety lamps has been introduced otherwise than as a temporary precaution against apprehended danger in any part of a mine, no lamp or light, other than a locked safety lamp, shall subsequently be allowed or used in that part without the sanction of the inspector of the division, which sanction shall not be withheld unreasonably, and any question as to whether such sanction has been unreasonably withheld shall be determined in manner provided by this Act for settling disputes.[3]

(4) The average percentage of inflammable gas found in six samples of air taken by an inspector in the air current in the return airway in the ventilating district at intervals of not less than a fortnight shall, for the purposes of this section, be deemed to be the percentage normally contained in the air.

(5) Where safety lamps are required, in pursuance of this section, to be used in any seam, they shall also be used in any cross-measure drift connected with that seam.[4]

[1] See s. 60, *post*, pp. 628, 629.

[2] "Ventilating district" is defined by s. 122, *post*, p. 661.

[3] See s. 116, *post*, p. 659.

[4] The directions as to the use of safety lamps impose a qualified duty on the owner: Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 163; and see s. 2, n. 1, *ante*, p. 585.

Construction of safety lamps. ([1887, s. 49, r. 9; 1896, s. 52).]

33. Wherever safety lamps are required by this Act or the regulations of the mine to be used, no safety lamp shall, after the first day of January nineteen hundred and thirteen be used by any person employed in the mine, unless it is provided by the owner of the mine, and is of a type for the time being approved, as respects the class of mines to which the mine belongs, by the Secretary of State.

Examination of safety lamps.

34.[1]—(1) In any mine or part of a mine in which safety lamps are required by this Act or the regulations of the mine to be used—

[New provisions are marked by a line.]

[1887, s. 49, rr. 10 & 11. 1896, s. 5 (2).]

(i) A safety lamp shall not be used, unless it has, since last in use, been thoroughly examined at the surface [2] by a competent person appointed in writing by the manager for the purpose and found by him in safe working order and securely locked, and a record shall be kept of the men to whom the several lamps are given out:

(ii) A competent person appointed in writing by the manager for the purpose shall also examine every lamp on its being returned, and, if on such an examination any lamp is found to be damaged, he shall record the nature of the damage in a book to be kept at the mine for the purpose, and the damage shall be deemed to have been due to the neglect or default of the person to whom the lamp was given out, unless he proves that the damage was due to no fault of his own and that he immediately gave notice of the damage to the fireman, examiner, or deputy, or some other official of the mine appointed in writing by the manager for the purpose:

(iii) A safety lamp shall not be unlocked except at an appointed lamp station [3] (which shall not be in a return airway) by a competent person appointed in writing by the manager for the purpose, nor, except in the case of electric hand lamps, shall it be relighted except by such a person at an appointed lamp station after examination by him, and no person other than such person as aforesaid shall have in his possession any contrivance for relighting or opening the lock of any safety lamp:

(iv) No part of a safety lamp shall be removed by any person whilst the lamp is in ordinary use.

(2) Where, in any such mine or part of a mine as aforesaid, any damage is caused to a lamp through the neglect or default of the person to whom the lamp was given out, that person shall be guilty of an offence against this Act.

[1] This section imposes a qualified duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. 154, *per* Cozens-Hardy, M.R., as to s. 49, r. 10 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] It should be observed that the examination may no longer take place underground, and that a record must now be kept of all lamps in use.

[3] Subs. (3) makes it illegal to fire a shot by means of an opened lamp.

Prohibition against possession of lucifer matches, &c. [1887, s. 49, r. 10 (iv.).]

35.—(1) In any mine or part of a mine in which safety lamps are required by this Act or the regulations of the mine to be used, no person shall have in his possession any lucifer match nor any apparatus of any kind for producing a light or spark except so far as may be authorised for the purpose of shot firing or relighting lamps

[New provisions are marked by a line.]

by an order made by the Secretary of State, or any cigar, cigarette, pipe, or contrivance for smoking.[1]

(2) The manager of a mine in which, or in any part of which, safety lamps are required by this Act or by the regulations of the mine to be used, shall, for the purpose of ascertaining before the persons employed below ground in the mine or in the part of the mine, as the case may be, commence work whether they have in their possession any lucifer match or such apparatus as aforesaid or cigar, cigarette, pipe, or contrivance for smoking, cause either all those persons, or such of them as may be selected on a system approved by the inspector of the division, to be searched in the prescribed manner after or immediately before entering the mine or that part of the mine.

(3) No person shall search any workmen in pursuance of this section, unless he has previously given an opportunity to some two workmen employed in the mine to search himself, and no lucifer match, or such apparatus as aforesaid, and no cigar, cigarette, pipe, or contrivance for smoking, has been found on him.

(4) Any person who refuses to allow himself to be searched in accordance with the foregoing provision shall be guilty of an offence against this Act, and shall not be allowed to enter the mine, or the part of a mine, as the case may be, and any person who, on being searched is found to have in his possession any of the articles prohibited under this section, shall be guilty of an offence against this Act.

[1] This section imposes a qualified duty on the owner: Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 163; and see s. 2, n. 1, *ante*, p. 585.

Shafts and Winding.

Requirements as to shafts and outlets. [1887, ss. 16–18.]

36.[1]—(1) There must be in every mine at least two shafts or outlets, with which every seam for the time being at work in the mine shall have a communication, so that such shafts or outlets shall afford separate means of ingress and egress available to the persons employed in every such seam, whether the shafts or outlets belong to the same mine or to more than one mine.

(2) Such two shafts or outlets must not at any point be nearer to one another than fifteen yards, and there shall be between them a communication not less than four feet wide and four feet high.[2]

(3) Every part of the mine in which ten or more persons are employed at the same time shall be provided with at least two ways affording means of egress to the surface, and so arranged that, in the event of either becoming impassable at any point, the other will afford means of egress to the surface.

(4) No person shall be precluded by any agreement from doing such acts as may be necessary for complying with the foregoing

[New provisions are marked by a line.]

provisions of this section, or be liable under any contract to any injunction, damages, penalty, or forfeiture for doing such acts as may be necessary in order to comply therewith.

(5) The foregoing provisions of this section shall not apply—

(i) in the case of a new mine or seam being opened—

(*a*) to any working for the purpose of making a communication between two or more shafts or outlets; or

(*b*) to any working for the purpose of searching for or proving minerals;

so long as not more than twenty persons are employed below ground at any one time in the whole of the different seams in connexion with a single shaft or outlet; nor

(ii) to any proved mine, so long as it is exempted by order of the Secretary of State on the ground either—

(*a*) that the quantity of mineral proved is not sufficient to repay the outlay which would be occasioned by sinking or making a second shaft or outlet, or by establishing communication with a second shaft or outlet, in any case where such communication existed and has become unavailable; or

(*b*) that the workings in any seam of the mine have reached the boundary of the property or the extremity of the mineral field of which that seam is a part, and that it is expedient to work away the pillars already formed in course of the ordinary working, notwithstanding that one of the shafts or outlets may be cut off by so working away the pillars of that seam;

and so long as not more than twenty persons are employed below ground at any one time in the whole of the different seams in connexion with a single shaft or outlet; nor

(iii) to any mine—

(*a*) while a shaft is being sunk, or an outlet being made; or

(*b*) one of the shafts or outlets of which has become, by reason of some accident, unavailable for the use of the persons employed in the mine;

so long as the mine is exempted by order of the Secretary of State, and as the conditions (if any) annexed to the order of exemption are duly observed.

(6) [3] The foregoing provisions of this section requiring the two shafts or outlets of a mine to be separated by a distance of not less than fifteen yards shall not apply to any mine which is provided with two shafts sunk before the first day of January eighteen hundred

[New provisions are marked by a line.]

and sixty-five, and at that time separated by a distance of less than ten feet, or commenced to be sunk before the first day of January eighteen hundred and eighty-eight, and separated by a distance of ten feet or upwards, but less than fifteen yards.

(7) The foregoing provisions of this section as to the dimensions of the communications between two shafts or outlets shall not apply to any mine or class of mines for the time being exempted therefrom by order of the Secretary of State by reason of the thinness of the seams or other exigencies affecting that mine or class of mines, and so long as the conditions (if any) annexed to the order of exemption are duly observed.

[1] Subss. (1), (2) and (3) impose direct duties on the owner: David *v.* Britannic Co., 1909, 2 K. B. 153, *per* Cozens-Hardy, M.R., as to s. 16 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] Under the present section the communication must not be less than four feet high, although it may have been made before 1887.

[3] See s. 3 of 25 & 26 Vict. c. 79, and s. 18 (iii) of the Act of 1887, both of which are repealed.

Fencing of shafts and entrances. [1887, s. 49, rr. 6, 18, 19.]

37.[1]—(1) Every entrance to any place below ground in a mine which is not in actual use or course of working or extension shall be kept securely fenced [2] across the whole width of the entrance, so as to prevent persons inadvertently entering the same.

(2) The top of every shaft which for the time being is out of use, or used only as a ventilating shaft, shall be kept securely fenced.[2]

(3) The top and bottom of every working, ventilating, or pumping shaft, and all entrances into the workings therefrom, shall be kept securely fenced,[2] but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used.[3]

[1] This section imposes direct duties upon the owner: David *v.* Britannic Co., 1909, 2 K. B. 154, 165, *per* Cozens-Hardy, M.R., and Buckley, L.J., as to s. 49, r. 6 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] A heap of stones between 2 feet and 2 feet 6 inches in height, and 5 feet broad at the base, and 18 inches at the top is not such a fence as is required by this section. Simpson *v.* Moore, 3 Comp. 26, a Scotch decision under the Act of 1872.

The obligation imposed by each of the subsections is not merely to fence properly, but to *keep* properly fenced. The provisions of ss. 1 and 2 therefore require a proper fence to be maintained without any breach or opening; and the provisions of sub-s. (3) require a proper fence to be kept closed, except when it is necessary that it should be opened; and on such occasions proper precautions must be taken: cf. s. 49, r. 19, of the Act of 1887; Sinnerton *v.* Merry, 13 R. 1012; and s. 23, rr. 6, 7 and 9 of the Met. Mines Regulation Act, 1872, *post*, pp. 713, 714.

[New provisions are marked by a line.]

[3] Where a pit was being deepened; and a line of rails was laid up to the pit mouth with no fence other than a movable wooden block across the rails, which it was the duty of the pit-headman not to remove, unless satisfied that the covering table was on the pit's mouth; it was held, that there was no breach of the corresponding rule 19, s. 49, of the Act of 1887. McGill *v.* Bowman, 18 R. 206.

Securing of shafts. [1887, s. 49, r. 20.]

38. Every working [1] or pumping shaft and every such shaft in the course of being sunk shall be securely cased or lined, or otherwise made secure.[2]

[1] See s. 40, n. 3, *post*, p. 618.

[2] This section extends the provisions of r. 20 of s. 49 of the Act of 1887 to every shaft, whether complete or in course of construction. Cf. Foster *v.* North Hendre Co., 1891, 1 Q. B. 71; and s. 23 (10) of the Met. Mines Regulation Act, 1872, *post*, p. 714.

Option of using downcast shaft. [1887, s. 49, r. 23.]

39. Where of the two shafts communicating with a seam one is a furnace shaft, and both shafts are provided with apparatus in use for raising and lowering persons, every person employed in the seam shall, on giving reasonable notice, have the option of using the downcast shaft.

Provision of winding apparatus. [1887, s. 16 (1) c; s. 49, rr. 25, 29, 30.]

40.—(1) Proper and separate apparatus for raising or lowering persons to or from the surface, of such a character as may be prescribed by the regulations of the mine, shall be kept at each of the two shafts or outlets required by the foregoing provisions of this Act,[1] and at any other shaft or outlet for the time being in use for the purpose of ingress or egress, and such apparatus, if not in actual use, shall be constantly available for use, and no person shall, except for the purposes of sinking operations or for the purpose of examining or repairing the shafts or outlets or the machinery or appliances therein, or for the purpose of accompanying animals or bulky material which cannot be raised or lowered in a cage, or where a written exemption is given by the inspector of the division, be raised or lowered otherwise than in a cage constructed in accordance with the provisions of this section : [2]

Provided that this subsection shall not apply to any outlet by which persons can walk into or out of the mine otherwise than by ladders.

(2) Where the apparatus ordinarily used for raising or lowering persons to or from the surface is worked by mechanical power it shall, if the shaft is vertical, be provided with a detaching hook and, if the shaft is more than one hundred yards in depth, shall also be provided with an effective automatic contrivance to prevent overwinding.

The provisions of this subsection shall not apply to any mine or

[New provisions are marked by a line.]

class of mine which is exempted by the Secretary of State on the ground of the special circumstances of the mine or class of mine, and shall come into operation on the first day of July nineteen hundred and thirteen or such later date as, in view of the circumstances of the mine, may be fixed by the inspector of the division.

(3) Guides shall be provided in the case of every working shaft [3] over fifty yards in depth, and, in the case of every shaft in the course of being sunk, over one hundred yards in depth, unless a written exemption is given by the inspector of the division.

(4) Keps for supporting the cage when at rest shall be provided at the surface level where mineral is usually unloaded, but shall not be provided at any intermediate landings in the shaft. The keps provided at the surface level, and also the keps, if any, provided at the bottom of the shaft, shall be used when persons are entering or leaving the cage.

The foregoing requirement as to the provision of keps shall not apply to a system of winding by means of a single rope where the cages are held by the friction of the rope on the winding sheave.

(5) Every winding rope shall be recapped at intervals of not more than six months in accordance with general regulations [4] under this Act, and no winding rope which has been in use for more than three and a half years or which has been spliced shall be used for raising or lowering persons.

(6) Every engine used for raising or lowering persons shall be completely separated by a substantial partition from every other engine used for that purpose at the same time, and from machinery used for any purpose other than for raising or lowering persons, unless a written exemption is given by the inspector of the division.

(7) Every cage shall be provided with catches or other suitable contrivance to prevent tubs falling out, and, if used for lowering or raising persons, shall be covered in completely at the top and closed in at the two sides in a sufficient manner to prevent persons or things from projecting beyond the sides, and shall be provided with suitable gates or other rigid fences and with a rigid hand bar fixed in a position where it can be easily reached by all persons in the cage.

(8) Rods shall not be used for attaching a cage to the winding rope unless connected with the cage through the medium of an efficient spring.

(9) There shall be on the drum of every apparatus used for lowering or raising persons such flanges or horns, and also, if the drum is conical, such other appliances as shall effectively prevent the rope from slipping.[5]

(10) Where the apparatus used for lowering or raising persons is worked by mechanical power, there shall be provided one or more

[New provisions are marked by a line.]

brakes of sufficient power by themselves to hold the cage when loaded at any point in the shaft, and a proper indicator (in addition to any mark on the rope) showing to the person who works the machine, on a dial or in some sufficient manner, the position of the cage in the shaft and placed in such a position as to be easily seen by him at the same time as the marks on the rope.

If the drum is not on the crank shaft, there shall be an adequate brake on the drum shaft.[6]

(11) No minerals, tubs, timber, or other materials, and no implements or tools other than scientific instruments, shall be raised or lowered whilst persons are being raised or lowered in the same shaft, whether in the same cage or not:

Provided that—

(*a*) this subsection shall not apply in the case of men working in the shafts, or in the case of men accompanying animals or bulky materials which cannot be raised or lowered in a cage; and

(*b*) where a shaft is divided throughout by a substantial partition, each section of the shaft shall, for the purpose of the provisions of this subsection, be deemed to be a separate shaft.

[1] See s. 36, *ante*, p. 613.

[2] The provision and maintenance of proper winding apparatus is a direct duty imposed on the owner: David *v.* Britannic Co., 1909, 2 K. B. p. 153, *per* Cozens-Hardy, M.R., as to s. 16 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[3] As to the meaning of working shaft, see Foster *v.* North Hendre Co., 1891, 1 Q. B. 71, cited, *post*, p. 714.

[4] See s. 86, *post*, p. 644.

[5] In Baker *v.* Carter, 3 Ex. D. 132, it was held that where there was a breach of the corresponding provision in the Coal Mines Regulation Act, 1872, an owner, who had taken no steps to comply with the provision other than appointing a competent manager, and publishing the provisions of the Act, was not liable. It is submitted that the duty of the owner is in fact greater, and is the same as his duty under subs. (10), as to which see next note.

[6] The section imposes a duty on the owner to provide such a brake and such machinery as their expert manager deems adequate: Watkins *v.* Naval Colliery Co., 1911, 2 K. B. 162; and see s. 2, n. 1, *ante*, p. 585.

This provision is not satisfied unless the brake is kept in proper working order: see Nimmo *v.* Clark, 10 M. 477, a Scotch decision under a former Act. Pumping gear, although serving the purpose of a brake, is not a brake within the rule: *ib.*

Means of signalling in shafts. [1887, s. 49, r. 25.]

41. Every working shaft[1] and every shaft in the course of being sunk shall, if exceeding twenty-five yards in depth, be provided with some proper means of communicating distinct and definite signals

[New provisions are marked by a line.]

from and to the bottom of the shaft, and from and to every entrance for the time being in use between the surface and the bottom of the shaft, to and from the surface.[2]

[1] As to the meaning of working shaft, see Foster *v.* North Hendre Mining Co., 1891, 1 Q. B. 71, cited, *post*, p. 714.

[2] It is to be observed that the provisions of the present section are more stringent than those of the corresponding r. (25) of the Act of 1887. It extends to shafts in course of being sunk; a depth of 25 yards is substituted for 50 yards; and no exemption can be obtained from the inspector of the division.

Travelling Roads and Haulage.

Provisions as to travelling roads.

42.—(1) For every seam[1] in a mine newly opened after the commencement of this Act and not being a mine exempted from this provision by general regulations[2] under this Act, there shall be provided (except within such distance from the shaft as may be fixed by the regulations of the mine) two main intake airways, which shall be of such size and shall be maintained in such condition as to afford a ready means of ingress to and egress from the workings, and one of which shall not be used for the haulage of coal.

General regulations[2] shall be made under this Act for determining the classes of mines which ought, having regard to their natural condition, to be exempted from the foregoing provision, and those regulations shall also provide for the exemption of any mine in which the number of persons employed underground does not at any one time exceed one hundred or which is naturally wet throughout.

(2) For every seam in a mine newly opened after the commencement of this Act which is exempted by general regulations from the foregoing provisions of this section, and for every seam in a mine opened before the passing of this Act, there shall be provided two main airways,[3] which shall be of such size and shall be maintained in such condition as to afford a ready means of ingress to and egress from the workings.

(3) In the case of every mine or seam newly opened after the commencement of this Act, all stoppings between main intake airways and main return airways and all air-crossings shall so far as practicable[4] be so constructed as not to be liable to be destroyed in the event of an explosion, and general regulations[2] may be made under this Act providing for the manner in which such stoppings and air-crossings are to be constructed.

(4) Where, in the case of any mine or seam newly opened after the passing of this Act, the air-current in the main return airway is found normally to contain more than one half per cent. of inflammable gas, that airway shall not (except for the purpose of removing any

[New provisions are marked by a line.]

coal gotten in the operation of enlarging or repairing the airway, or within a distance of three hundred yards from the shaft) be used for the haulage of coal.

For the purpose of this provision, the average percentage of inflammable gas found in six samples of air taken by an inspector [5] in the air-current at intervals of not less than a fortnight shall be deemed to be the percentage normally contained in the air-current.

(5) In the case of every mine newly opened after the commencement of this Act, the main airways, if driven in the same seam, shall be so arranged that they shall not, at any point, except for the purpose of crossing, or within a distance of three hundred yards from the shafts, or such other distance from the shafts as may be fixed by the regulations of the mine, be less than such distances apart as shall be fixed by the regulations of the mine, and the distances from one another of the connexions between the main airways shall not be less than the minimum distance specified in those regulations.

[1] It will be observed that this provision extends to new seams opened at any colliery after the passing of the Act.

[2] See s. 86, *post*, p. 644.

[3] "Main airway" is defined by s. 122, *post*, p. 661.

[4] The practicability to be determined by the physical and engineering exigencies of the mine and not by the cost: Wales *v.* Thomas, 16 Q. B. D. 340.

[5] *I.e.* A fireman, examiner or deputy inspecting under the provisions of ss. 64 and 65, *post*, pp. 631, 632.

Provisions as to travelling on haulage roads, &c.

43.—(1) On and after the first day of January, nineteen hundred and fourteen, no person, other than an official of the mine or a person employed on the road in connexion with the haulage, or a person engaged in carrying out any repairing work requiring to be carried out forthwith, shall, while the haulage is in motion, travel on foot on any haulage road on which the haulage is worked by gravity or mechanical power, except—

(*a*) Where there is provided on one side of the road a clear space of at least two feet in width between the tubs and that side of the road, and the rate of haulage is not more than ten miles an hour; or

(*b*) Where, in the case of a haulage road in which such a clear space as aforesaid is not provided, the rate of haulage is not more than three miles an hour and the gradient does not exceed one in twelve, or in respect of any part of the road not exceeding one hundred yards in length, one in nine, and the space between the tracks of rail, where there is more than one track, is kept clear of obstructions:

[New provisions are marked by a line.]

Provided that—

(i) in the case of a haulage road in which such a clear space as aforesaid has been provided, but the space so provided has in some part of it been reduced to a width of less than two feet by reason of some cause over which the owner, agent, or manager of the mine has no control, the foregoing prohibition shall not apply during the time (not exceeding the time reasonably required for the purpose) during which the repairs necessary for restoring the width to two feet are being carried out; and

(ii) the exception herein-before contained as respects haulage roads in which no such clear space as aforesaid is provided shall apply only in the case of mines opened before the commencement of this Act or mines in which the character of the strata makes it unreasonable to require such a clear space to be provided.

If any question arises as to whether the character of the strata in any mine makes it unreasonable to require a clear space to be provided, that question shall be determined in the manner provided by this Act for settling disputes.[1]

(2) Where the haulage is worked by gravity or mechanical power, no person shall be allowed to ride on sets or trains of tubs except—

(*a*) a person travelling on a set or train for the purpose of detaching or attaching tubs from or to the haulage rope, if that set or train is not proceeding at a higher speed than three miles an hour; or

(*b*) men being conveyed, with the written permission of the manager or under-manager, to or from their work at the commencement or end of their employment (including any person in charge of a set or train of tubs on which men are being so conveyed); or

(*c*) the driver of a locomotive.

(3) In all places where sets or trains consisting of three or more tubs are coupled or uncoupled, there shall be a clear space of at least two feet between tubs standing on any rails and the side of the road nearest to those rails:

Provided that—

(*a*) where there are two parallel lines of rails, the foregoing provision shall not apply if there is a clear space of at least three feet between tubs standing on those rails; and

(*b*) where, in the case of any existing mine, compliance with the requirements of this subsection would necessitate

[New provisions are marked by a line.]

the removal of arching or other masonry work, or where, in the case of any mine, sets or trains of tubs are coupled or uncoupled at the face, or at the pass-bye next the face, other provisions for securing safety may be substituted by the regulations of the mine for those requirements.

The provisions of this subsection shall come into operation on the first day of January, nineteen hundred and thirteen:

Provided that this subsection shall not apply to any district in any mine as respects which the Secretary of State is satisfied that it will be worked out within three years from the commencement of this Act.

(4) In measuring any clear space for the purposes of this section, any props or other supports of the roof projecting beyond the side of the road shall be deemed to form part of the side.

[1] See s. 116, *post*, p. 659.

Provision of refuge holes. [1887, s. 49, rr. 14–16.]

44.[1]—(1) Every haulage road on which the haulage is worked by gravity or mechanical power, shall be provided with sufficient refuge holes [2] at intervals of not more than ten yards, but, if the gradient does not exceed one in twenty, and either such a clear space as aforesaid is provided or the rate of haulage is not more than three miles an hour, it shall be sufficient if the intervals are not more than twenty yards.

(2) Every haulage road on which the haulage is worked by animal power shall be provided with sufficient refuge holes at intervals of not more than twenty-five yards.

(3) Every refuge hole shall be—

(*a*) as near as may be three feet in width and not less than four feet in depth;

(*b*) not less in height than the height of the haulage road at the point where the hole is, or six feet, whichever is the less;

(*c*) if such a clear space as aforesaid is provided, on the same side of the road [3] as that space;

(*d*) if no such clear space as aforesaid is provided, on the same side of the road as the other refuge holes, or where the road is on a curve, on the outer side of the curve;

(*e*) marked with a distinctive number;

(*f*) if necessary to make it readily visible, constantly kept whitewashed both inside and for a distance of not less than one foot round the aperture;

(*g*) kept clean.

(4) Nothing shall be placed in any refuge hole or across the entrance thereto so as to impede ingress.

[New provisions are marked by a line.]

(5) Notwithstanding anything in this section, it shall not be necessary to provide refuge holes on any road within twenty-five yards of the working face.

[1] This section imposes a direct duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. p. 154, *per* Cozens-Hardy, M.R., as to s. 49, r. 15 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] It was said that the mouths of cross roads may be "man-holes" or "places of refuge" within the corresponding provision (s. 49, r. 15) of the Act of 1887: Hughes *v.* Clyde, &c., Co., 19 R. 343, *per* Lord Justice Clerk.

[3] Where a road is divided by a wall into two passages, each passage is a separate road within this rule, notwithstanding that the wall may in many places be broken down: Wilson *v.* Wishaw Coal Co., 10 R. 1021, a Scotch decision under the Coal Mines Regulation Act of 1872.

Dimensions of travelling roads. [1887, s. 49, r. 17.]

45.—(1) Every travelling road shall be of adequate height, and, if the height of any such road appears to the inspector of the division to be inadequate, he may require that the height be increased to such extent as he thinks proper, and the manager shall comply with the requisition unless he disputes the reasonableness thereof, in which case the dispute shall be settled in manner provided by this Act for settling disputes.[1]

(2) Every road on which a horse or other animal is used underground or by which it has to pass to get to its work shall be of sufficient dimensions to allow the horse or other animal to pass without rubbing itself or its harness against the roof or sides or the bars or props supporting the roof or sides.

[1] See s. 116, *post*, p. 659.

Apparatus on haulage roads.

46.—(1) Every rope used for haulage which is capped shall be recapped at intervals of not more than six months in accordance with general regulations under this Act.

(2) Sufficient and suitable sprags, lockers, or drags shall be provided and used for the purpose of holding a tub or set of tubs—

(*a*) at the top of every incline on which the haulage is worked by gravity;

(*b*) at every place where sets or trains consisting of three or more tubs are coupled or uncoupled;

(*c*) on all roads or parts of roads where the gradient exceeds one in twenty, and the haulage is worked by animal power.

(3) Stop blocks or other similar contrivances shall be provided at the top of every incline on which the haulage, not being endless-rope or endless-chain haulage, is worked by gravity, and at every entrance thereto by which tubs are brought on to the incline.

(4) On every haulage road where mechanical haulage, not being endless-rope or endless-chain haulage, is used, and where the gradient exceeds one in twelve—

[New provisions are marked by a line.]

(*a*) runaway switches or other suitable contrivances shall be provided where the use thereof is practicable to prevent accidents in the event of a tub running away;

(*b*) there shall be provided and attached to an ascending tub or set of tubs a back-stay or other suitable contrivance for preventing the tub running back;

(*c*) over-chains, bridle-chains, or other suitable appliances shall be provided to prevent tubs in which persons are being conveyed from becoming disconnected and running away.

Clearance of haulage roads.

47. Every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions.

Provision of means of signalling. [1887, s. 49, r. 14.]

48. Every haulage road on which persons travel and on which the haulage is worked by gravity or mechanical power shall be provided (if exceeding thirty yards in length) with some proper means of communicating distinct and definite signals between all regular stopping places and the ends of the road.

Support of Roof and Sides.

Securing of roofs and sides. [1887, s. 49, r. 21.]

49. The roof and sides of every travelling road and working place shall be made secure,[1] and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure.

[1] It was held in Bett *v.* Dalmeny Oil Co., 7 F. 787, that the corresponding rule (21) of the Act of 1887 imposed a direct and absolute duty on the owner, but this decision was questioned in Butler (or Black) *v.* Fife Coal Co., 1909, S. C. 152; and must, it is submitted, be treated as overruled by Britannic Coal Co. *v.* David, 1910, A. C. 74; see, however, Butler's case in the House of Lords, 1912, A. C., pp. 163, 173, 174; and see s. 2, n. 1, *ante*, p. 585.

Systematic support of roof and sides. [1887, s. 49, r. 22.]

50.—(1) Where props or props and bars or chocks are used to support the roof at the working face, the roof under which any work of getting coal or filling tubs is carried on shall be systematically and adequately supported, and the props or chocks shall be set at such regular intervals and in such manner as may be specified in the notice herein-after mentioned.

(2) Holing props or sprags shall be set as soon as practicable, and shall be set at such regular intervals and in such manner as may be specified in the notice herein-after mentioned, and shall not be removed until the coal is about to be taken down and before the roof supports (if any) have been advanced in the manner specified in the notice.

(3) In all parts of a roadway in which sets or trains consisting of

three or more tubs are coupled or uncoupled, the roof and sides shall be systematically and adequately supported, and in such parts and in all other parts of the roadway the roof or sides of which require to be supported, if props or bars are used as supports, such supports shall be set at such regular intervals and in such manner as may be specified in the notice herein-after mentioned.

(4) The manager shall, by notice, specify the manner in which the supports are to be set and advanced, and the maximum intervals to be observed on roadways between the supports, and at the face—

(*a*) between each row of props ;
(*b*) between adjacent props in the same row ;
(*c*) between the front row of props and the face ;
(*d*) between the holing props or sprags ;
(*e*) between chocks :

Provided that the interval between holing props or sprags shall in no case exceed six feet.

(5) If the inspector of the division considers that the system of supporting the roof and sides adopted in any part of a mine is unsatisfactory, either by reason of the distances fixed or any of them being excessive or otherwise, he may require the manager to fix some less distance or otherwise modify the system, and the manager shall comply with the requisition unless he disputes the reasonableness thereof, in which case the dispute shall be settled in manner provided by this Act for settling disputes.[1]

(6) This section shall not apply to the mines of stratified ironstone in the Cleveland district or of thick coal in the South Staffordshire district or to mines in any other district as respects which the Secretary of State is satisfied that similar conditions prevail.

(7) Nothing in this section shall prevent a workman from setting supports in his working place at more frequent intervals than those specified in the notice aforesaid, where necessary for safety.

[1] See s. 116, *post*, p. 659.

Supply of props and bars. [1887, s. 49, r. 22.]

51. Where the work of erecting the supports of the roof and sides of working places is done by the workmen employed therein, a sufficient supply of timber or other materials suitable for supports shall be kept at or within ten yards of every working place where, in pursuance of this Act, supports are required to be erected, and also at the pass-bye, siding, or other similar place in the mine convenient to the workmen ; and it shall be the duty of the firemen, examiners, or deputies to see that such sufficient supply is so kept, and any working place in which such a sufficient supply is not kept shall not be deemed to be safe for the purpose of the provisions of

[New provisions are marked by a line.]

this Act. Sufficient timber or other materials as aforesaid, to enable the firemen, examiners, or deputies to see that the provisions of this section are complied with shall be constantly provided.

Withdrawal and removal of supports.

52.—(1) In any part of a mine where any work is being carried out which necessitates the removal of roof supports, temporary supports shall, in all cases, be set so as to secure the safety of the persons employed.

(2) Props shall not be withdrawn from the waste or goaf or from under a roof which appears to a fireman, examiner, or deputy to be insecure otherwise than by means of a safety contrivance, and it shall be the duty of the firemen, examiners, and deputies to examine all roofs from under which props are about to be withdrawn with a view to determining whether the props ought to be withdrawn by means of a safety contrivance.

Signalling.

Signalling.

53.—(1) The general code of signals in mines shall be such uniform code as may be prescribed by general regulations [1] under this Act.

(2) There shall be in attendance at the top of every shaft by which any persons are about to be lowered into the mine a competent person for the purpose of receiving and transmitting signals, and, as long as persons are in the mine below ground, a competent person shall be in constant attendance for that purpose at the top of the shaft from which such persons are to be raised and, unless all the persons in the mine are officials or persons authorised in writing by the manager to give signals, at every entrance from the workings in which such persons are engaged into the shaft from which persons are raised.

(3) All signals, other than those relating to underground haulage, transmitted to the surface shall be transmitted simultaneously to the engineman and to the persons stationed as aforesaid at the top of the shaft.

[1] See s. 86, *post*, p. 644.

Telephonic communication.

54. Such means of telephonic communication between different parts of a mine shall be provided as may be required by the regulations of the mine.

Provisions as to Machinery.

Fencing machinery. [1887, s. 49, r. 31.]

55. Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced.[1]

[1] This section imposes a direct duty on the agent, and therefore also upon the owner: Corfield *v.* Evans (1886) decided under the Coal Mines Regulation

[New provisions are marked by a line.]

Act, 1872. A report of this case is given at p. 230 of the Second Report of the Royal Commission on Mines; and see s. 2, n. 1, *ante*, p. 585.

56.[1]—(1) Every steam boiler used for generating steam in or about a mine must, whether separate or one of a range— Boilers. [1887, s 49, r. 32.]

(*a*) have attached to it, a proper safety-valve, and also a proper steam-gauge and water-gauge, to show respectively the pressure of steam and the height of water in each boiler; and

(*b*) be examined thoroughly by a competent person at least once in every fourteen months; and

(*c*) be cleaned out and examined internally, as far as the construction of the boiler will permit, by the person in charge of it once at least in every three months.

(2) Every such boiler, safety-valve, steam-gauge, and water-gauge must be maintained in proper working condition, and all water-gauges shall be adequately protected by a covering or guard unless so constructed as to be equally safe to the persons employed whether so protected or not.

(3) A report of the result of every examination under this section in the prescribed form and containing the prescribed particulars, shall, within fourteen days, be entered into or attached to a book to be kept at the mine for the purpose, and the report shall be signed by the person making the examination, and, if that person is an inspector of a boiler inspecting company or association, by the chief engineer of the company or association.

(4) The foregoing provisions of this section shall not apply to the boiler of any locomotive which belongs to and is used by any railway company.

(5) A steam boiler shall not be placed under ground in any mine after the passing of this Act.

[1] This section would probably be held to impose a direct duty on the owner to provide such valves, etc., as the manager advised: cf. Watkins *v.* Naval Colliery Co., cited, s. 40, n. 6, *ante*, p. 618.

57.—(1) A competent male person not less than twenty-two years of age shall be appointed in writing by the manager[1] for the purpose of working the machinery which is employed in lowering and raising persons from or to the surface, and a person so appointed for that purpose is in this Act referred to as a winding engineman. Appointment and duties of engineman. [1887, s. 49, r. 24.]

(2) A winding engineman shall attend for the purpose aforesaid during the whole time that any person is below ground in the mine.[2]

(3) After the prescribed[3] date and except as may be provided by general regulations[4] under this Act, a winding engineman shall not be employed for more than eight hours in any one day, and provision

[New provisions are marked by a line.]

shall be made by general regulations for requiring particulars to be recorded in a book kept at the mine with respect to the hours of employment of winding engine-men.

(4) Where on any haulage road the haulage is effected by means of any machinery worked either by mechanical power or by animal or manual labour, the person in charge of such machinery, and, if persons are being conveyed, the person in charge of any part of the machinery, ropes, chains, or tackle connected therewith, must be a competent male person not less then eighteen years of age. The foregoing provision shall not apply in the case of machinery worked by an engine of not more than ten horse-power, and used for the purpose of hauling mineral from the face.

Where the machinery is worked by an animal, the person under whose direction the driver of the animal acts shall for the purposes of this section be deemed to be the person in charge of the machinery.

[1] Although the duty of appointing a competent person rests with the manager, the remaining provisions of the section impose a qualified duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. p. 154, *per* Cozens-Hardy, M.R., as to s. 49, r. 24, of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585; and see R. *v.* Handley, 9 L. T. (N. S.) 827, decided under a former Act.

[2] This provision applies when the machinery is being used for the purpose of raising and lowering materials, as well as when it is being used for raising and lowering persons: Soutar *v.* Clark, 7 F. 1, decided under s. 49, r. 24, of the Act of 1887. It was further held in the same case that where a special rule established under s. 51 of that Act provided that machinery should be "under the control of an engine-man," it was not sufficient that the machinery should be under the immediate control of an assistant acting under the control and direction of the engine-man, but that the machinery must be under the actual control of the latter.

[3] "Prescribed" means prescribed by the Secretary of State; see s. 122, *post*, p. 661.

[4] See s. 86, *post*, p. 644.

Restriction on use of internal combustion engines in mines.

58. Except with the permission of the Secretary of State, no internal combustion engine shall be newly introduced underground in any coal mine after the passing of this Act.

Egress from engine rooms, &c. [1887, s. 49, r. 15.]

59. Every steam engine room and boiler gallery and motor room in or about a mine shall be provided with at least two proper means of egress.[1]

[1] This section imposes a direct duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. p. 154, *per* Cozens-Hardy, M.R., as to s. 49, r. 15 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

Electricity.

Restrictions on the use of electricity.

60.—(1) Electricity shall not be used in any part of a mine where, on account of the risk of explosion of gas or coal dust, the use of

electricity would be dangerous to life, and, if the owner of a mine, on being required by an inspector of the division not to use, or to desist from using, electricity in the mine or any part thereof on such ground as aforesaid, refuses to do so, the question as to the application of this section to the mine or part thereof shall be settled in manner provided by this Act for settling disputes.[1]

(2) If at any time in any place in the mine the percentage of inflammable gas in the general body of the air in that place is found to exceed one and a quarter, the electric current shall at once be cut off from all cables and other electrical apparatus in that place, and shall not be switched on again as long as the percentage of inflammable gas exceeds that amount: Provided that nothing in this subsection shall apply to any telephone or signalling wires or instruments as long as the conditions prescribed with reference to the installation and use of such wires and instruments are complied with, nor to any electric hand-lamps of a type for the time being approved.

(3) When any question under this section is to be settled in the manner provided by this Act for settling disputes, the owner shall, pending the settlement of the question, comply with the requirement of the inspector subject to an appeal to the chief inspector.

(4) The use of electricity in any mine shall be subject to general regulations under this Act.[2]

[1] See s. 116, *post*, p. 659.
[2] See s. 86, *post*, p. 644.

Explosives.

Explosives. [1887, s. 49, r. 12; 1896, ss. 5 (3), 6.]

61.—(1) The Secretary of State may, by order [1] of which notice shall be given in such manner as he may direct,[2] regulate the supply, use, and storage [3] of any explosives at mines or any class of mines, and may, by any such order, prohibit the use of any explosive which appears to him of a kind to be or to be likely to become dangerous in mines or any class of mines, either absolutely or subject to such conditions as may be prescribed by the order.

(2) No explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner.

[1] Orders in force at the passing of this Act are kept in force by s. 126 (*a*), *post*, p. 663. The orders with regard to explosives so in force are dated the 21st Feb., 12th August, 10th Oct., and 16th Dec., 1910. Under these orders (a) certain explosives in unsafe mines are absolutely prohibited; (b) other explosives in unsafe mines are conditionally prohibited; (c) all explosives in main roads are conditionally prohibited; (d) detonators are conditionally

[New provisions are marked by a line.]

prohibited; and (e) specified explosives and fuses are permitted under specified conditions. These orders (especially as regards the permitted explosives) are of great length; and it would be impracticable to state them *in extenso*.

The Order of 21st Feb., 1910, repealed all previous explosive orders.

The provisions as to the use of explosives impose a qualified duty on the owner: David *v.* Britannic Co., 1909, 2 K. B. p. 154, *per* Cozens-Hardy, M.R., as to s. 49, r. 12 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] This provision is directory only, and is not a condition precedent to the coming into operation of the order: Jones *v.* Robson, 1901, 1 K. B. 673; decided under s. 6 of the Act of 1896.

[3] S. 59 of the Explosives Act, 1875 (38 Vict. c. 17), provides that "where a magazine or store is established for the purpose of any mine subject to the Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872, by the owner (as defined by such Act) of the mine, the Secretary of State may from time to time by order direct an inspector under either of those Acts to act with respect to such magazine or store as a Government inspector under this Act, and may revoke any such order; and such inspector shall, while such order is in force, have for that purpose the same powers and authorities as he has under the said Acts, and also the powers and authorities of a Government inspector under this Act." This enactment applies to the present Act; see s. 126 (a), *post*, p. 663; s. 83 of the Act of 1887.

Prevention of Coal Dust.

Prevention of coal dust.

62. In every mine, unless the floor, roof, and sides of the roads are naturally wet throughout,—

(1) arrangements shall be made to prevent, as far as practicable,[1] coal dust from the screens entering the downcast shaft; and, in the case of a mine newly opened after the passing of this Act, no plant for the screening or sorting of coal shall be situated within a distance of eighty yards from any downcast shaft unless a written exemption is given by the inspector of the division;

(2) the tubs shall be so constructed and maintained as to prevent, as far as practicable,[1] coal dust escaping through the sides, ends, or floor of the tubs, but any tub which was in use in any mine at the date of the passing of this Act may, notwithstanding that it is not so constructed, continue to be used in that mine for a period of five years from the said date;

(3) the floor, roof and sides of the roads shall be systematically cleared so as to prevent, as far as practicable,[1] coal dust accumulating;

(4) Such systematic steps, either by way of watering or otherwise, as may be laid down by the regulations of the mine shall

[New provisions are marked by a line.]

be taken to prevent explosions of coal dust occurring or being carried along the roads;

(5) The roads shall be examined daily and a report (to be recorded in a book kept at the mine for the purpose) made on their condition as to coal dust and on the steps taken to mitigate danger arising therefrom.

[1] The words "as far as practicable" do not relate to carrying on the mine as a profitable concern, but to physical or engineering difficulties: Wales *v.* Thomas, 16 Q. B. D. 340.

Inspections as to Safety.[1]

Appointment of stations. [1887, s. 49, r. 4.]

63. For the purpose of the inspections before the commencement of work in a shift herein-after mentioned, one or more stations shall be appointed at the entrance to the mine or to different parts of the mine,[2] as the case may require, and no workman shall pass beyond any such station until the part of the mine beyond that station has been examined and reported to be safe in manner herein-after mentioned.

[1] Ss. 62–65 impose qualified duties upon the owner. David *v.* Britannic Co., 1909, 2 K. B. 154, *per* Cozens-Hardy, M.R., as to s. 49, rr. 4 and 5 of the Act of 1887: Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 149, as to r. 4; and see s. 2, n. 1, *ante*, p. 585.

[2] The words "different parts of the mine" refer to mines divided into parts under s. 25, *ante*, p. 604. Wales *v.* Thomas, 16 Q. B. D. 348, *per* Smith, J., a decision under the Coal Mines Regulation Act, 1872.

Inspections before commencing work. [1887, s. 49, r. 4; 1896, s. 5 (1).]

64.—(1) The firemen, examiners, or deputies of a mine shall, within such time not exceeding two hours immediately before the commencement of work in a shift as may be fixed by the regulations of the mine, inspect every part of the mine situated beyond the station or each of the stations, and in which workmen are to work or pass during that shift, and all working places in which work is temporarily stopped within any ventilating district[1] in which the men have to work, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned.

(2) Except in the case of a mine in which inflammable gas is unknown, the inspection shall be made with a locked safety lamp, and no other light shall be used during the inspection.

(3) A full and accurate report specifying whether or not, and where, if any, noxious or inflammable gas was found, and whether or not any, and, if any, what defects in roofs or sides and other sources of danger were observed, shall be recorded without delay in a book to be kept at the mine for the purpose, and accessible to the workmen, and such report shall be signed by, and, so far as the same does not consist of

[New provisions are marked by a line.]

printed matter, shall be in the handwriting of, the person who made the inspection.

(4) For the purpose of the foregoing provisions of this section, two or more shifts succeeding one another so that work is carried on without any interval are to be deemed to be one shift.

[1] "Ventilating district" is defined by s. 122, *post*, p. 661.

Inspections during shifts. [1887, s. 49, r. 4.]

65. A similar inspection shall be made twice at least in the course of each shift of all parts of the mine situated beyond the station or each of the stations aforesaid and in which workmen are to work or pass during that shift, but it shall not be necessary to record a report of the first of such inspections in a book: Provided that, in the case of a mine worked by a succession of shifts, no place shall remain uninspected for an interval of more than five hours.

Examination of machinery. [1887, s. 49, r. 5.]

66. Competent persons appointed by the manager for the purpose, shall—

(*a*) once at least in every twenty-four hours, examine thoroughly the state of the external parts of the machinery, the state of the guides in the shafts, and the state of the head gear, ropes, chains, cages, and other similar appliances of the mine which are in actual use for the purpose of raising or lowering persons in a mine; and

(*b*) once at least in every week, examine thoroughly the state of all other machinery, gear, and other appliances of the mine which are actually in use, whether above ground or below ground; and

(*c*) once at least in every week, examine thoroughly the state of the shafts in which persons are lowered or raised; and

(*d*) once at least in every week, examine thoroughly the state of every airway in the mine;

and shall make a full and accurate report of the result of the examination, and every such report shall be recorded without delay in a book to be kept at the mine for the purpose and accessible to the workmen, and shall be signed by the person who made the examination.[1]

[1] The direction to report and record the report applies to the daily as well as to the weekly examination: Scott *v.* Bould, 1895, 1 Q. B. D., directed under s. 49, r. 5 of the Act of 1887.

Withdrawal of Workmen.

Withdrawal of workmen in case of danger. [1887, s. 49, r. 7.]

67.—(1) If at any time it is found by the person for the time being in charge of the mine,[1] or any part thereof,[2] that, by reason of the prevalence of inflammable or noxious gases, or of any cause whatever, the mine or any place in the mine is dangerous,[3] every workman shall

[New provisions are marked by a line.]

be withdrawn from the mine or place found dangerous, and a fireman, examiner, or deputy, or other competent person authorised by the manager or under-manager for the purpose shall inspect the mine or place found dangerous, and, if the danger arises from inflammable gas, shall inspect the mine or place with a locked safety lamp, and in every case shall make a full and accurate report of the condition of the mine or place; and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, or for exploration, be readmitted into the mine or place found dangerous, until the same is reported by the fireman, examiner, or deputy [4] not to be dangerous.

(2) For the purposes of this section, a place shall be deemed to be dangerous if the percentage of inflammable gas in the general body of the air in that place is found to be two and a half or upwards, or if situate in a part of a mine worked with naked lights, one and one quarter or upwards,

(3) Every such report shall be recorded in a separate book which shall be kept at the mine for the purpose, and shall be signed by the person who made the inspection.

(4) If a workman discovers the presence of inflammable gas in his working place, he shall immediately withdraw therefrom and inform the fireman, examiner, or deputy.

[1] The obligation to withdraw workmen is upon the person for the time being in charge of the mine, and the section therefore imposes only a qualified duty upon the owner: Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 149, decided under s. 49, r. 7 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585.

[2] It has been suggested that these words may refer to a mine divided into parts under s. 25, *ante*, p. 604; Wales *v.* Thomas, 16 Q. B. D. 348, decided under the Coal Mines Regulation Act, 1872.

[3] A dangerous accumulation of water in an adjoining mine would come within this provision: see R. *v.* Spon Lane Colliery Co., 3 Q. B. D. 673, decided under the Coal Mines Regulation Act, 1872; and see s. 99, n. 1, *post*, p. 652.

[4] A report by a competent person other than a fireman or deputy would not be a sufficient report upon which to readmit men to the mine.

Miscellaneous.

Water and bore-holes. [1887, s. 49, r. 13.]

68. Where any working has approached within forty yards of a place containing or likely to contain an accumulation of water or other liquid matter, or of disused workings (not being workings which have been examined and found to be free from accumulations of water or other liquid matter), the working shall not exceed eight feet in width, and there shall be constantly kept extending to a sufficient distance, not being less than five yards, in advance, at least one

[New provisions are marked by a line.]

bore-hole near the centre of the working, and sufficient flank bore-holes on each side at intervals of not more than five yards.

Storage and use of inflammable material below ground.

69.—(1) No oil, grease, canvas, or other highly inflammable material shall be stored below ground in any mine except in a fire-proof receptacle or chamber.

(2) In any mine, being a mine newly opened after the passing of this Act and not being a small mine,[1] no inflammable material likely to cause danger from fire to the persons employed below ground shall be used in the construction of the pithead frame or of the roof, if any, over the pithead.

(3) No inflammable material likely to cause danger from fire to the persons employed below ground shall, after the passing of this Act, be used in the construction of any engine-house below ground.

[1] See s. 122, *post*, p. 661.

Provision of means for extinguishing fire.

70. At all parts of a mine where timber, grease, or other inflammable material is stored, and at all insets where timber is used for the construction of the staging, and at every pithead, steam-engine room, and boiler gallery in the construction of which timber is used, adequate means of extinguishing fire shall be provided.

Barometer, &c. [1887, s. 49, r. 33.]

71.—(1) A barometer and thermometer shall be placed above ground in a conspicuous position near the entrance to the mine, and a hygrometer shall be placed below ground in a conspicuous position near a shaft or outlet both in the main intake airway and in the main return airway.

(2) The instruments required to be provided under this section shall be read at such intervals and by such persons as may be prescribed by general regulations,[1] and the readings taken at the prescribed intervals shall be entered in a book to be kept at the mine for the purpose.

[1] See s. 86, *post*, p. 644.

Wilful damage. [1887, s. 49, r. 35.]

72. No person shall wilfully damage, or without proper authority remove or render useless, any apparatus appliance or thing provided in any mine in compliance with this Act.[1]

[1] As to penalties where the safety of persons employed in the mine is endangered, see s. 101 (4), *post*, p. 653. As to malicious injuries, see *ante*, pp. 551 *et seq.*

Prohibition of inexperienced persons working alone as getters. [1887, s. 49, r. 39.]

73. No person shall be allowed to work as a coal or ironstone getter otherwise than under the supervision of a skilled workman until he has had two years' experience of such work under such supervision, or unless he has been previously employed for two years

[New provisions are marked by a line.]

in or about the face of the workings, nor shall a skilled workman have under his supervision at the same time more than one person who has not had such experience, or been so employed, as aforesaid.[1]

[1] As to liability for misrepresentation of experience, see s. 102 (7), *post*, p. 655.

74. Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Part of this Act or the regulations of the mine or with a view to safety. Observance of directions. [1887, s. 49, r. 36.]

75.[1] Any person[2] who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance.[3] Penalties for non-compliance with provisions as to safety. [1887, s. 50.]

[1] This section re-enacts s. 50 of the Act of 1887, which dealt with criminal liability for breach of general rules under s. 49 of that Act, as s. 90, *post*, p. 646, re-enacts s. 51 (3), which dealt with similar liability for breach of special rules made under s. 51 (1) of the same Act. The provisions of both those sections were confined to criminal cases: see Watkins *v.* Naval Colliery, 1911, 2 K. B. 162, 185, 190; David *v.* Britannic Co., 1909, 2 K. B. pp. 154, 160. Although the present section and s. 90 are in similar terms, the provisions of s. 102 (8), *post*, p. 655, place the civil and criminal liability of owners upon the same footing; and see as to civil liabilities, s. 2, n. 1, *ante*, p. 585.

[2] The present section only applies to contraventions of the provisions of Part II. of this Act. Protection is afforded to owners and agents in case of breaches of all provisions by s. 102, *post*, p. 654, which is of general application.

A working miner may be convicted under this section: Frecheville *v.* Souden, 48 L. T. (N. S.) 612, decided under the Metalliferous Mines Regulation Act, 1872: see also Higginson *v.* Hapley, 19 L. T. (N. S.) 690, decided under the Mines Regulation Act, 1860; Higham *v.* Wright, 2 C. P. D. 397, decided under the Coal Mines Regulation Act, 1872, and cited, *post*, p. 647.

[3] No owner, agent or manager is to be held liable for a breach of duty beyond his control and against which it was impracticable for him to provide; s. 102 (3), *post*, p. 654.

If, however, the contravention or non-compliance is a breach of an absolute statutory duty imposed *directly* on the owner, agent or manager, he will be liable under the first part of the present section: Confield *v.* Evans (1886), *ante*, p. 626; David *v.* Britannic Co., 1909, 2 K. B. 153, 165. But in case of a breach of a statutory duty imposing a qualified obligation upon the owner, agent or manager, he will escape liability under the provisions of the present section and s. 102 (1) if he can

prove that he has taken all reasonable means of publishing and enforcing the provisions of the Act. In most of such cases an owner who takes no part in the management of a mine will be exempt if he publishes the provisions, appoints competent officials, and provides a sufficient sum for all necessary expenses: Dickenson *v.* Fletcher, L. R. 9 C. P. 1, decided under the Mines Regulation Act, 1860; Baker *v.* Carter, 3 Ex. D. 132, decided under the Coal Mines Regulation Act, 1872; Butler (or Black) *v.* Fife Coal Co., 1909, S. C., p. 160; 1912, A. C., p. 168, decided under the Act of 1887; and the agent will be similarly exempt if he takes similar precautions, and also makes a general inspection from time to time: Stokes *v.* Checkland, 68 L. T. 457; Stokes *v.* Mitcheson, 1902, 1 K. B. 857, decided under the Act of 1887. It might be held that s. 102 (1) relieves the agent of the duty of inspection; but it would not be safe to rely upon this.

The special circumstances of the case may, however, render this duty more onerous, as where the manager is unable to attend to his duties, or the owner or agent is aware of a special or unusual danger: Wynne *v.* Forrester, 48 L. J. M. C. 140; Anderson *v.* Atkinson, 99 L. T. 22; Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 149.

One of several co-owners may be made separately liable: R. *v.* Brown, 7 E. & B. 757, decided under 18 & 19 Vict. c. 108; Baker *v.* Carter, *u. s.*

A manager will of course be liable for a breach of a statutory duty committed in his presence or with his knowledge: Howells *v.* Wynne, 15 C. B. (N. S.) 3, decided under the Mines Regulation Act, 1860. And a manager may be convicted under this section if he neglects to use the means at his disposal for preventing the breach of a statutory provision, or to point out to the owner alterations or improvements required to comply with the Act; Hall *v.* Hopwood, 49 L. J. M. C. 17, decided under the Coal Mines Regulation Act, 1872. But he will be held to have taken all "reasonable means" if he has called the attention of the owner to improvements or alterations which he himself has not the means to carry out.

It is not necessary on a prosecution under this section that the justices should find whether an owner, agent or manager allowed a breach to be committed. If they find that a breach has been committed, they may convict the owner, agent and manager unless such persons prove that they took all reasonable means: Jones *v.* Robson, 1901, 1 Q. B. p. 681. But although the burden of proving that all reasonable means were taken is on the owner, agent or manager, it is not necessary in all cases that they should be called as witnesses to establish their own innocence (Stokes *v.* Mitcheson, *u. s.* p. 363; Baker *v.* Carter, *u. s.*).

Part III.

Provisions as to Health.

Provision as to sanitary conveniences. [1887, s. 74.]

76. General regulations[1] shall be made under this Act with respect to the provision and use of sanitary conveniences in mines, both above and below ground.

[1] See s. 86, *post*, p. 644.

[New provisions are marked by a line.]

77.—(1) Where a majority, ascertained by ballot of two-thirds of the workmen employed in any mine to whom this section applies, represent to the owner of the mine that they desire that accommodation and facilities for taking baths and drying clothes should be provided at the mine and undertake to pay half the cost of the maintenance of the accommodation and facilities to be provided, the owner shall forthwith provide sufficient and suitable accommodation and facilities for such purposes as aforesaid : Provision of washing and drying accommodation.

Provided that the owner shall not be bound to provide any such accommodation and facilities, if the estimated total cost of maintenance exceeds threepence per week for each workman liable to contribute under this section.

(2) General regulations [1] shall be made under this Act for determining what are sufficient and suitable accommodation and facilities for the purposes of this section, and any such regulations may make different requirements as respects different classes or descriptions of mines.

(3) For the purposes of this section, cost of maintenance includes interest on capital expenditure (not exceeding five per cent. per annum), and if any question arises as to the estimated cost of maintenance that question shall, in accordance with regulations as to procedure and costs to be made by the Secretary of State, be referred to an arbitrator to be agreed upon between the parties, or, in default of agreement as to an arbitrator, to a person appointed by the judge of county courts for the district, or in Scotland by the sheriff of the county, in which the mine is situate, and the decision of the arbitrator or of the person so appointed, as the case may be, shall be final.

(4) Where any such accommodation and facilities have been provided, every workman at the mine to whom this section applies (whether he was or was not employed at the mine at the time when the ballot of the workmen for the purposes of this section was taken) shall be liable to contribute a sum equal to one-half of the cost of maintenance (but not exceeding three halfpence per man per week), and the owner shall be entitled to recover such contributions from the workmen liable to contribute by deduction from their wages, notwithstanding the provisions of any Acts relating to truck or any contract to the contrary :

Provided that the obligation to contribute shall not apply to any workman who is exempted on the ground of health in accordance with the regulations of the mine.

(5) The management of the accommodation and facilities provided under this section shall be under the control of a committee to be established in accordance with the regulations of the mine, and consisting as to one half of members appointed by the owner of the

[New provisions are marked by a line.]

mine and as to the other half of members appointed by the workmen liable to contribute under this section. The powers and duties of the committee in relation to the management of the accommodation and facilities shall be such as may be laid down by general regulations,[1] and the owner of the mine shall not be liable to any penalty as for failure to comply with the provisions of this section in respect of any act performed by the committee in pursuance of their powers or of any failure by the committee to perform any of their duties.

(6) The workmen [2] to whom this section applies are all workmen employed underground, and all workmen engaged on the surface in handling tubs, screening, sorting, or washing coal, or loading coal into wagons.

(7) This section shall not apply to any mine where the total number of the workmen employed at the mine to whom this section applies is less than one hundred, or to any mine held by the owner under a lease of which the unexpired term is less than ten years or to any mine as respects which the Secretary of State is satisfied that it will be worked out within ten years.[3]

(8) If the owner of any mine fails to comply with the provisions of this section, he shall be guilty of an offence against this Act.

(9) Where a majority, ascertained by ballot of two-thirds of the workmen at a mine, represent to the owner of the mine that they desire that this section should cease to have effect as respects the mine, this section shall, unless the owner by notice affixed at the mine within one month after the receipt by him of the representation declares that he does not assent thereto, cease to have effect accordingly as from a date to be agreed upon between the owner and the workmen.

(10) A fresh representation shall not be made as respects any mine either under subsection (1) or under subsection (9) of this section before the expiration of five years from the date of any previous representation made with respect to that mine.

[1] See s. 86, *post*, p. 644.

[2] "Workman" is not defined by the Act and must therefore be taken to include women as well as men, see Interpretation Act, 1889, s. 1 (a).

[3] The decision of the Secretary of State appears to be final: cf. s. 113, *post*, p. 659.

Use of sprays when drilling silicious rock.

78. A drill worked by mechanical power shall not be used for drilling in ganister hard sandstone or other highly silicious rock, the dust from which is liable to give rise to fibroid phthisis, unless a water jet or spray or other means equally efficient is used to prevent the escape of dust into the air, and, if any person contravenes or fails to comply with the provisions of this section, he shall be guilty

[New provisions are marked by a line.]

of an offence against this Act, and, in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager [1] of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means to prevent the contravention or non-compliance.

[1] This section is intended to impose a qualified duty on the owner and agent: see s. 2, n. 1, *ante*, p. 585; and s. 75, n. 3, *ante*, pp. 635, 636.

Notification of industrial diseases.

79. Written notice of every case of any disease occurring in a mine and occasioned by the nature of the employment (being a disease specified in an order made by the Secretary of State for the purpose) shall forthwith be sent to the inspector of the division, and the provisions of this Act with respect to the notification of accidents [1] shall apply to any such case in like manner as to any such accident as is mentioned in those provisions:

Provided that a person shall not be liable to any penalty for failing to send notice under this section of any disease so specified, if he proves that he was not aware of the disease having occurred, and that he had taken all reasonable steps for having the occurrence of all such diseases brought to his notice.

[1] See Part IV., *infra*.

Part IV.

Provisions as to Accidents.

Notices of Accidents.

Notices of accidents. [1887, s. 35. 1906, s. 2.]

80.—(1) Where, in or about any mine, whether above or below ground, any accident occurs which either—

(i) causes loss of life to any person employed in or about the mine; or

(ii) causes any fracture of the head or of any limb, or any dislocation of a limb, or any other serious personal injury to any person employed in or about the mine; or

(iii) is caused by any explosion of gas or coal dust or any explosive, or by electricity, or by overwinding, or by any other such special cause as the Secretary of State specifies by order, and causes any personal injury whatever to any person employed in or about the mine;

the owner, agent, or manager of the mine shall forthwith send notice

[New provisions are marked by a line.]

in writing of the accident, and of any loss of life or personal injury caused thereby, to the inspector of the division, in such form and accompanied by such particulars as may be prescribed,[1] and, in the case of an accident causing loss of life or serious personal injury, notice in such form and accompanied by such particulars as may be prescribed shall also be sent to the person (if any) nominated by the persons employed at the mine [2] for the purpose of receiving notice under this section on their behalf.

(2) Where loss of life or serious personal injury has immediately resulted from an accident, the place where the accident occurred shall be left as it was immediately after the accident, until the expiration of at least three days after the sending of such notice as aforesaid of such accident, or until the visit of the place by an inspector, whichever first happens,[3] unless compliance with this enactment would tend to increase or continue a danger or would impede the working of the mine.

(3) Where any personal injury, of which notice is required to be sent under this section, results in the death of the person injured, notice in writing of the death shall be sent to the inspector of the division on behalf of a Secretary of State within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager.

(4) Every owner, agent, or manager who fails to act in compliance with this section shall be guilty of an offence against this Act.[4]

[1] See s. 81, n. 1, *post*, p. 641.

[2] Cf. s. 16 (1), *ante*, p. 597.

[3] The representatives of the workmen who are entitled to inspect under s. 16, *ante*, p. 597, must also be afforded facilities for inspection.

[4] The owner and agent are protected by s. 102, *post*, p. 654; and see s. 75, n. 3, *ante*, p. 635.

Power to extend provisions as to notice of accidents to dangerous occurrences. [1906, s. 5.]

81.—(1) If the Secretary of State considers that, by reason of the risk of serious injury to persons employed, it is expedient that notice should be given under this Act in every case of any special class of explosion, fire, collapse of buildings, accidents to machinery or plant, or other occurrences at a mine, the Secretary of State may, by order, extend the provisions of this Act requiring notice of accidents to be given to an inspector to any such class of occurrences, whether personal injury or disablement is caused or not, and, where any such order is made, the provisions of this Act shall have effect as extended by the order.[1]

(2) The Secretary of State may, by any such order, allow the required notice of any occurrence to which the order relates, instead

[New provisions are marked by a line.]

of being sent forthwith, to be sent within the time limited by the order.

[1] An order was made under s. 5 of the Notice of Accidents Act, 1906, on the 22nd Dec., 1906. That order remains in force by virtue of s. 126 (a), *post*, p. 663. For particulars of the order, see *post*, p. 701, n. 1.

Reports, Investigations, and Inquests.

Special reports of inspectors. [1887, ss. 44, 46.]

82. Where at any mine an accident has caused loss of life or personal injury to any person, the Secretary of State may, at any time, direct an inspector to make a special report with respect to the accident, and the Secretary of State may cause any such report to be made public at such time and in such manner as he may think fit.

Formal investigation when directed by Secretary of State. [1887, s. 45.]

83.—(1) Where it appears to the Secretary of State that a formal investigation of any accident and of its causes and circumstances is expedient, the Secretary of State may direct such investigation to be held,[1] and with respect to any such investigation the following provisions shall have effect :—

(*a*) The Secretary of State may appoint a competent person to hold the investigation, and may appoint any person or persons possessing legal or special knowledge to act as assessor or assessors in holding the investigation :

(*b*) The person or persons so appointed (herein-after called the court) shall hold the investigation in open court, in such manner and under such conditions as the court may think most effectual for ascertaining the causes and circumstances of the accident, and enabling the court to make the report in this section mentioned :

(*c*) The court shall have for the purpose of the investigation all the powers of a court of summary jurisdiction when acting as a court in hearing informations for offences against this Act,[2] and all the powers of an inspector [3] under this Act, and in addition the following powers :—

(i) power by summons signed by the court, to require the attendance of all such persons as it thinks fit to call before it and examine for the said purpose ; and

(ii) power to require the production of all books, papers, and documents which the court considers important for the purposes of the inquiry :

(*d*) Persons attending as witnesses before the court shall be allowed such expenses as would be allowed to witnesses attending before a court of record ; and, in case of dispute

[New provisions are marked by a line.]

as to the amount to be allowed, the same shall be referred by the court to a master of the Supreme Court, who on request, signed by the court, shall ascertain and certify the proper amount of the expenses :

(*e*) The court shall make a report to the Secretary of State, stating the causes and circumstances of the accident, and adding any observations which the court thinks right to make, and the Secretary of State shall cause that report to be laid in full before both Houses of Parliament :

(*f*) All expenses incurred in and about an investigation under this section (including the remuneration of any person appointed to act as assessor) shall be deemed to be part of the expenses of the Secretary of State in the execution of this Act.[4]

(2) If any person without reasonable excuse (proof whereof shall lie on him) fails to comply with any summons or requisition of the court, or impedes the court in the execution of its duty, he shall be guilty of an offence against this Act, and a person who is guilty of any such offence shall, in addition to any other fine to which he is liable under this Act, be liable to a fine not exceeding one pound for every day during which the offence continues.

[1] Where the accident is caused by the explosion of a boiler, an investigation may also be held under the Boiler Explosions Act, 1882 : R. *v.* Commissioners under Boiler Explosions Act, 1882, 1891, 1 Q. B. 703.

[2] The Court is vested with these powers for the purpose of investigation only, it could not therefore prohibit the use of machinery under s. 108, *post*, p. 657.

[3] As to powers of inspectors, see s. 98, *post*, p. 651.

[4] See s. 112, *post*, p. 659.

Provisions as to coroners' inquests on deaths from accidents in mines. [1887, s. 48.]

84.—(1) Where a coroner holds an inquest on the body of any person whose death may have been caused by any accident of which notice is required by this Act to be given to the inspector of the division,[1] the coroner shall adjourn the inquest, unless an inspector, or some person on behalf of the Secretary of State, is present to watch the proceedings.

(2) The coroner, at least four days before holding the adjourned inquest, shall send to the inspector of the division notice in writing of the time and place of holding the adjourned inquest.

(3) The coroner, before the adjournment, may take evidence to identify the body, and may order the interment thereof.

(4) If an accident has not occasioned the death of more than one person, and the coroner has sent to the inspector of the division notice of the time and place of holding the inquest at such time as

to reach the inspector not less than twenty-four hours before the time of holding the same, it shall not be imperative on him to adjourn the inquest in pursuance of this section, if the majority of the jury think it unnecessary so to adjourn.

(5) An inspector shall be at liberty at any such inquest to examine any witness, subject nevertheless to the power of the coroner to disallow any question which, in his opinion, is not relevant or is otherwise not a proper question.

(6) Where evidence is given at an inquest at which an inspector is not present of any neglect as having caused or contributed to the accident, or of any defect in or about the mine appearing to the coroner or jury to require a remedy, the coroner shall send to the inspector of the division notice in writing of such neglect or defect.

(7) Any person having a personal interest in [2] or employed in or about or in the management of the mine in or about which the accident occurred shall not be qualified to serve on the jury empannelled on the inquest; and it shall be the duty of the constable or other officer not to summon any person disqualified under this provision, and it shall be the duty of the coroner not to allow any such person to be sworn or to sit on the jury.

(8) Any relative of any person whose death may have been caused by the accident with respect to which the inquest is being held, and the owner, agent, or manager of, or the fireman, deputy, or examiner of the district in, the mine in which the accident occurred, and any person appointed by the order in writing of the majority of the workmen employed at the said mine, and any person appointed in writing by any association of workmen to which the deceased at the time of his death belonged, or by any association of employers of which the owner is a member, or by any association to which any official of or workman employed in the mine belongs, shall be at liberty to attend and examine any witness, either in person or by his counsel, solicitor, or agent, subject nevertheless to the power of the coroner to disallow any question which, in his opinion, is not relevant or is otherwise not a proper question.

(9) Every person who fails to comply with the provisions of this section shall be guilty of an offence against this Act.[3]

[1] See s. 80, *ante*, p. 639.

[2] The words "having a personal interest in the mine" would probably be held to have a wider meaning than the words "interested in the minerals of the mine" in s. 26 (1), *ante*, p. 605.

[3] A prosecution cannot be instituted against a coroner except with the consent in writing of the Secretary of State: see s. 102 (6), *post*, p. 655.

[New provisions are marked by a line.]

Rescue and Ambulances.

Rescue work and ambulances. [1887, s. 49, r. 34; 1910, s. 1.]

85. General regulations [1] made under this Act may require provision to be made at all mines or any class of mines in regard to all or any of the following matters:—

(*a*) Supply and maintenance of appliances for use in rescue work and formation and training of rescue brigades:

(*b*) Supply and maintenance of ambulance appliances and the training of men in ambulance work.

[1] See next section.

Part V.

Regulations.

General and Special Regulations.

General regulations.

86.—(1) The Secretary of State may by order make such general regulations for the conduct and guidance of the persons acting in the management of mines or employed in or about mines as may appear best calculated to prevent dangerous accidents and to provide for the safety, health, convenience, and proper discipline of the persons employed in or about mines, and for the care and treatment of horses and other animals used therein,[1] and any such regulations may vary or amend any of the provisions contained in Part II. of, or the Third Schedule to, this Act.

(2) The regulations made under any such order may apply either to all mines or to any specified class or description of mines, and may provide for the exemption of any specified class or description of mines either absolutely or subject to conditions.

(3) The provisions contained in Part I. of the Second Schedule to this Act [2] shall have effect with respect to the procedure for making orders under this section.

(4) An order made under this section shall be laid as soon as possible before both Houses of Parliament, and shall have effect as if enacted in this Act.[3]

(5) An order made under this section may be revoked, altered, or added to by an order made in like manner and subject to the same provisions as the original order.

[1] As to horses and other animals, see s. 109, *post*, p. 657, and Sched. III., *post*, p. 673.

[2] See *post*, p. 671.

[3] The construction of general and special regulations will (like the special

rules established under the Act of 1887) accordingly be governed by the principles applicable to statutes: Higham *v.* Wright, 2 C. P. D. 401, *per* Cose, J., as to special rules established under the Coal Mines Regulation Act of 1872; and see s. 90, *post*, p. 646.

Special regulations.

87.—(1) Where the inspector of the division, or the owner of, or a majority ascertained by ballot of the workmen employed in, any mine is of opinion that the general regulations for the time being in force with respect to the mine ought in their application to that mine to be supplemented or modified, the inspector or the owner or such majority of workmen may transmit for the approval of the Secretary of State special regulations for the mine.

(2) The provisions set out in Part II. of the Second Schedule to this Act [1] shall have effect with respect to the procedure for obtaining the approval of the Secretary of State.

(3) When special regulations have been approved by the Secretary of State, they shall, as respects that mine, have effect until revoked as if they formed part of the general regulations applicable to the mine.[2]

(4) Where any special regulations are in force with respect to any mine they may be revoked, altered or added to at the instance of the inspector of the division, or of the owner of, or a majority of workmen employed in, the mine in like manner and subject to the same provisions as the original special regulations.

[1] See *post*, p. 672.

[2] See s. 86, n. 3; and s. 90, *post*, p. 646.

Publication of Abstract of Act and of Regulations.

Publication of abstract of Act and copy of special rules. [1887, s. 57.]

88.—(1) For the purpose of making known the provisions of this Act and the regulations of the mine to all persons employed in and about a mine, the prescribed abstract of this Act and a correct copy of all the regulations of the mine shall be published as follows:—

(*a*) The owner, agent, or manager of the mine shall cause a copy of the abstract and a copy of the regulations, with the name of the mine and the name and address of the inspector of the division, and the name of the owner or agent and of the manager, appended thereto, to be posted up in some conspicuous place at or near the mine, where they may be conveniently read or seen by the persons employed; and so often as the same become defaced, obliterated, or destroyed, shall cause them to be renewed with all reasonable despatch:

(*b*) The owner, agent, or manager shall supply gratis to each person employed in or about the mine at the commencement of

his employment, and on each occasion when a new abstract is issued or new regulations made, a book containing so much of the abstract and so much of the regulations as the Secretary of State may prescribe as being the parts of the abstract and regulations for the time being in force affecting persons of the class to which the person belongs, and shall also supply, at a price not exceeding one penny, to any such person who applies therefor at the office at which the persons immediately employed by the owner, agent, or manager are paid, a copy of such book : [1]

(*c*) Every copy of the regulations shall be kept distinct from any regulations which depend only on the contract between the employer and employed.

(2) In the event of any non-compliance with the provisions of this section by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means,[2] by enforcing to the best of his power the observance of this section, to prevent such non-compliance.

[1] A miner may be convicted of a breach of the provisions of or regulations made under the Act without proving that he had received an abstract or copy: Higginson *v.* Hapley, 19 L. T. (N. S.), cited s. 90, n. 2, *post*, p. 647.

[2] See s. 75, n. 3, *ante*, p. 635; and s. 2, n. 1, *ante*, p. 585.

Regulations applicable to mines. [1887, s. 56.]

89.—(1) The general regulations applicable to a mine, as supplemented or modified by the special regulations, if any, for the time being in force with respect to the mine shall be the regulations of the mine.

(2) An inspector shall, when required, certify a copy which is shown to his satisfaction to be a true copy of any regulations which for the time being are in force in any mine, and a copy so certified shall be evidence (but not to the exclusion of other proof) that those regulations are the regulations of the mine and of the fact that they are duly made under this Act.

Penalty for breach of regulations. [1887, s. 51 (3).]

90.[1] If any person who is bound to observe the regulations of any mine, acts in contravention of or fails to comply with any of them, he shall be guilty of an offence against this Act,[2] and also the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means,[3] by publishing and to the best of his power enforcing the regulations, to prevent such contravention or non-compliance.

[1] This section which is in similar terms to s. 75 must be read with s. 102, *post*, p. 654, see s. 75, n. 1, *ante*, p. 635.

[New provisions are marked by a line.]

[2] Regulations, as above stated (s. 86, n. 3, *ante*, p. 644), have the same force as special rules under the previous Acts, as to which there have been several decisions. In Frecheville *v.* Souden, 48 L. T. (N. S.) 612, it was decided that a working miner might be convicted for breach of a special rule under the Met. Mines Act, 1872, just as he may be for breach of a general rule: Frecheville *v.* Souden, 48 L. T. (N. S.), 612, cited *ante*, p. 635. See also Higginson *v.* Hapley, 19 L. T. (N. S.) 690 (decided under a former Act), where it was held, that a miner might be convicted, although one of the special rules provided, that every miner should receive a copy of them, and there was no evidence that he had done so. In Higham *v.* Wright, 2 C. P. D. 397 (decided under the Coal Mines Regulation Act, 1872), one of the special rules provided, that no one employed in the mine should ascend the pit contrary to the directions of the hooker-on. The miners had power to dismiss themselves at a moment's notice; and some of them, having done so, ascended the pit contrary to the direction of the hooker-on. It was held that they had broken the rule.

[3] The considerations applicable to s. 75 apply equally to the present section; see s. 75, n. 3, *ante*, p. 635.

PART VI.

EMPLOYMENT.

Employment of Boys, Girls, and Women.

91. No boy under the age of fourteen years, and no girl or woman [1] of any age, shall be employed in or allowed to be for the purpose of employment in any mine below ground. Nothing in this section shall apply to any boy who has been lawfully employed in any mine below ground before the passing of this Act.

Prohibition against employment of boys, girls, and women below ground. [1887, s. 4. 1900, s. 1.]

[1] "Boy," "Girl," and "Woman" are defined by s. 122, *post*, p. 661.

92. With respect to boys, girls, and women employed above ground, in connexion with any mine, the following provisions shall have effect [1]:—

Employment of boys, girls, and women above ground. [1887, s. 7. 1907, s. 1.]

(1) No boy or girl under the age of thirteen years shall be so employed, unless lawfully so employed before the passing of this Act:

(2) No boy or girl of or above the age of thirteen years and no woman shall be so employed for more than fifty-four hours in any one week or more than ten hours in any one day:

(3) No boy, girl, or woman shall be so employed between the hours of nine at night and five on the following morning, nor on Sunday, nor after two o'clock on Saturday afternoon:

[New provisions are marked by a line.]

(4) There shall be allowed an interval of not less than twelve hours between the termination of employment on one day, and the commencement of the next employment:

(5) A week shall be deemed to begin at midnight on Saturday night and to end at midnight on the succeeding Saturday night:

(6) No boy, girl, or woman shall be employed continuously for more than five hours, without an interval of at least half an hour for a meal, nor for more than eight hours on any one day, without an interval or intervals for meals amounting altogether to not less than one hour and a half:

(7) No boy, girl, or woman shall be employed in moving railway waggons, or in lifting, carrying, or moving any thing so heavy as to be likely to cause injury to the boy, girl, or woman.

[1] The employment of women, young persons, and children in any place above ground adjacent to a shaft of a mine in which place the employment of women is not regulated by this Act or the Metalliferous Mines Act, 1872, called in the Factory and Workshop Act, 1901, a "pit bank," is governed by the provisions of that Act, see ss. 26, 27, 149, and Sched. VI., Part II.

Notice fixing hours of employment.

93.—(1) The manager of every mine shall fix within the limits allowed by the foregoing section, and shall specify in a notice in the prescribed form, which must be affixed at the mine—

(*a*) the period of employment; and

(*b*) the times allowed for meals;

and no boy, girl, or woman shall be employed in connexion with any mine except during the period so fixed, but a different period and different times may be fixed for different persons and for different days.

(2) A change in the said period or times shall not be made oftener than once a quarter unless for special cause allowed in writing by an inspector:

Provided that provision may be made by general regulations[1] for allowing a different time to be substituted in case of any special emergency for the time for any meal fixed under this section.

[1] See s. 86, *ante*, p. 644.

Register of boys, girls, and women employed. [1887, s. 8.]

94.—(1) The owner, agent, or manager of every mine shall keep in the office at the mine a register, and shall cause to be entered in that register, in such form as the Secretary of State may from time to time prescribe, the name, age, residence, and date of first employment of all boys employed in the mine below ground, and of all boys,

girls, and women employed above ground in connexion with the mine; and shall, on request, produce the register to any inspector, and to any officer of the local education authority for the area in which the mine is situate, at all reasonable times, and shall allow any such inspector or officer to inspect and copy the same.

(2) The immediate employer of every boy, other than the owner, agent, or manager of the mine, before he causes the boy to be below ground in any mine, shall report to the manager of the mine, or to some person appointed by that manager, that he is about to employ the boy in the mine.[1]

[1] It follows from the language of this subsection that a person working in a mine is not necessarily in the employment of the mine owners, so as to make him a "workman" under the Employers and Workmen Act, 1875: Marrow *v.* Flimby, &c., Co., 1898, 2 Q. B. 588.

Penalty for employment of persons in contravention of Act. [1887, s. 9.]

95. If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, any provision of this Act with respect to the employment of boys, girls, or women, or to the register of boys, girls, and women, or to reporting the intended employment of boys, he shall be guilty of an offence against this Act; and, in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the provisions of this Act, to prevent the contravention or non-compliance.[1]

[1] Part VI. imposes qualified duties upon owners: David *v.* Britannic Co., 1909, 2 K. B. p. 153, *per* Cozens-Hardy, M.R., as to ss. 9 and 11 of the Act of 1887; and see s. 2, n. 1, *ante*, p. 585; and see s. 75, n. 3, *ante*, p. 635.

As to liability for misrepresentation as to age, see s. 102 (7), *post*, p. 655.

Wages.

Prohibition of payment of wages in licensed premises, and provision as to weekly payment of wages. 10 Edw. 7. & 1 Geo. 5. c. 24. 1887, s. 11.]

96.—(1) No wages shall be paid[1] to any person employed in or about any mine at or within any licensed premises as defined by the Licensing (Consolidation) Act, 1910,[2] or other house of entertainment, or any office, garden, or place belonging or contiguous thereto, or occupied therewith.

(2) The wages of all persons employed in or about any mine shall be paid weekly, if a majority of such persons so desire, and there shall be delivered to each such person a statement containing detailed particulars of how the amount paid to him is arrived at.

(3) Every person who contravenes or fails to comply with or permits any person to contravene or fail to comply with this section

[New provisions are marked by a line.]

shall be guilty of an offence against this Act; and, in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent the contravention or non-compliance.[3]

[1] For other provisions with regard to the payment of wages, see The Truck Acts, 1831, 1887, and 1896, *post*, Chap. XXII.

[2] *I.e.* premises in respect of which a justices' licence has been granted and is in force. Licensing Consolidation Act, 1910, s. 110.

[3] See s. 95, n. 1, *ante*, p. 649.

Part VII.

Inspectors.

Appointment of Inspectors.

Appointment of inspectors of mines. [1887, ss. 39, 40.]

97.—(1) The Secretary of State may appoint any fit persons to be inspectors (under whatever title he may from time to time fix) of mines, and assign them their duties, and may award them such salaries as the Treasury may approve and may appoint a chief inspector with an office in London, and may remove any such inspector: Provided always, that, in the appointment of inspectors of mines in Wales and Monmouthshire, among candidates otherwise equally qualified, persons having a knowledge of the Welsh language shall be preferred.

(2) Notice of the appointment of every such inspector shall be published in the London Gazette.

(3) Every such inspector is referred to in this Act as an inspector, and the inspector of a division means the inspector who is for the time being assigned to the division district or portion of the United Kingdom with reference to which the term is used.

(4) Any person who practises, or acts, or is a partner of any person who practises or acts as a land agent, or mining engineer, or as a manager, viewer, agent, or valuer of mines, or arbitrator in any difference arising between owners, agents, or managers of mines, or is a miners' agent or a mine owner (whether the mine is one to which this Act applies or not), shall not act as an inspector of mines under this Act, and no inspector shall be a partner or have any interest, direct or indirect, in any mine in the United Kingdom whether the mine is one to which this Act applies or not.

[New provisions are marked by a line.]

Powers and Duties of Inspectors.

Powers of inspectors. [1887, s. 41.]

98.—(1) An inspector under this Act shall have power to do all or any of the following things; namely,

(i) to make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act relating to matters above ground or below ground are complied with in the case of any mine:

(ii) to enter, inspect, and examine any mine, and every part thereof, at all reasonable times by day and night, but so as not to impede or obstruct the working of the mine:

(iii) to examine into and make inquiry respecting the state and condition of any mine, or any part thereof, and the ventilation of the mine, and the sufficiency of the regulations for the time being in force in the mine, and all matters and things connected with or relating to the safety of the persons employed in or about the mine or any mine contiguous thereto, or the care and treatment of the horses and other animals used in the mine, and may take with him for the last-mentioned purpose a duly qualified veterinary surgeon:

(iv) to exercise such other powers as may be necessary for carrying this Act into effect.

(2) The owner of every mine, his agents and servants, shall furnish the means required by an inspector as necessary for an entry, inspection, examination, inquiry or the exercise of his powers under this Act in relation to that mine.

(3) If any person wilfully delays an inspector in the exercise of any power under this section, or fails to comply with the requisition of an inspector in pursuance of this Act, or to produce any certificate or document which he is required by or in pursuance of this Act to produce, that person shall be deemed to obstruct an inspector in the execution of his duties under this Act.

(4) Every person who obstructs any inspector in the execution of his duty under this Act shall be guilty of an offence against this Act.

Notice by inspector of causes of danger not expressly provided against. [1887, s. 42.]

99.—(1) If in any respect (which is not provided against by any express provision of this Act, or by any regulation) any inspector finds any mine, or any part thereof, or any matter, thing, or practice in or connected with any mine, or with the control, management, or direction thereof by the owner, agent, or manager to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, he may give notice in writing thereof to the

[New provisions are marked by a line.]

owner, agent, or manager of the mine, and shall state in the notice the particulars in which he considers the mine or any part thereof, or any matter, thing, or practice, to be dangerous or defective, and require the same to be remedied or, if the same cannot be remedied, require the men to be withdrawn from the mine or part; and unless the same be forthwith remedied or the men withdrawn he shall also report the same to the Secretary of State.[1]

(2) If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice or to withdraw the men he may, within seven days after receipt of the notice, send his objection in writing, stating the grounds thereof, to the Secretary of State; and thereupon the matter shall be determined in manner provided by this Act for settling disputes.[2]

(3) If the owner, agent, or manager fails, when no objection is sent as aforesaid, to comply with the requisition of the notice within seven days after the expiration of the time for objection, or when there has been a reference to a referee to comply with the award within the time fixed by the award, he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of the offence:

Provided that the court, if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not, with reasonable diligence, been able to complete the works, may adjourn any proceedings taken before them for punishing the offence, and, if the works are completed within a reasonable time, no penalty shall be inflicted.

(4) No person shall be precluded by any agreement from doing, or be liable to any injunction, damages, penalty or forfeiture in respect of, such acts as may be necessary in order to comply with the provisions of this section.

[1] The inspector is for the first time given power to require men to be withdrawn, and he will therefore be able to exercise this power in a case where the cause of danger is one over which the owner has no control: cf. s. 42 of the Act of 1887; R. *v.* Spon Lane Colliery Co., 3 Q. B. D. 673.

A notice under this section requiring a defect to be remedied must be limited to stating the particulars in which the inspector considered the mine, or any part thereof, or any matter or thing or practice, to be dangerous or defective, and to requiring the same to be remedied. The inspector is not entitled to say what the remedy should be, or to require any particular remedy to be adopted: *Re* Secretary of State and Fletcher, 18 Q. B. D. 339; ee p. 343, *per* Lord Esher, decided under s. 42 of the Act of 1887.

[2] See s. 116, *post*, p. 659.

In case of a reference the question before the referee is whether the notice of the inspector is one to which the objections of the owner form a sufficient answer. No question as to the proper remedy is before him, and he has no jurisdiction to determine what the remedy should be, or to direct any particular

[New provisions are marked by a line.]

course to be adopted. His finding should follow the submission, and should merely state whether or not the matter in question is dangerous or defective so as to threaten or tend to the bodily injury of any person: *Re* Secretary of State and Fletcher, *sup.*

100. Every inspector of a division under this Act shall make an annual report of his proceedings during the preceding year to the Secretary of State, which report shall be laid before both Houses of Parliament; and the chief inspector shall make to the Secretary of State an annual report of the proceedings under this Act during the preceding year, and the report of the chief inspector shall be laid before both Houses of Parliament. Annual reports of inspectors. [1887, s. 43.]

Part VIII.

Supplemental.

Legal Proceedings.

101.—(1) Every person employed in or about a mine, other than an owner, agent, or manager, who is guilty of any act or omission which in the case of an owner, agent, or manager would be an offence against this Act, shall be deemed to be guilty of an offence against this Act. Penalty for offences against Act. [1887, ss. 59, 60.]

(2) If a mine is not managed in conformity with this Act, the owner, agent, and manager thereof shall each be deemed to be guilty of an offence against this Act.[1]

(3) Every person who is guilty of an offence against this Act for which a penalty is not expressly provided, shall be liable to a fine not exceeding, if he is an owner, agent, or manager, or under-manager, twenty pounds, and, if he is any other person, five pounds, for each offence; and, if an inspector has given written notice of any such offence, to a further fine not exceeding one pound for every day after such notice that such offence continues [2] to be committed.

(4) Where a person is guilty of any offence against this Act which, in the opinion of the court that tries the case, is one which was likely to endanger the safety of the persons employed in or about the mine, or to cause serious personal injury to any of such persons, or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, such person shall be liable, if the court is of opinion that a fine will not meet the circumstances of the case, to imprisonment, with or without hard labour, for a period not exceeding three months.[3]

[1] As to the liability of owners and agents, see s. 2, n. 1, *ante*, p. 585, and s. 75, n. 3, *ante*, p. 685.

[New provisions are marked by a line.]

[2] This word does not apply where a penalty is prescribed; see Stokes *v.* Hill, 1901, 1 K. B., p. 496, decided under the Act of 1887. None of the sections of the present Act prescribe a particular penalty; but such a penalty may be imposed by general or special regulations.

[3] Although s. 68 of the Act of 1887 is not in terms re-enacted by the present Act, there is nothing in the Act to prevent any person from being indicted under any other Act or otherwise, so that he be not punished twice for the same offence.

Prosecutions of owners, agents, managers, &c. [1887, ss. 64, 65.]

102.[1]—(1) Where proceedings are taken under this Act against the owner or agent of a mine in respect of an offence under this Act for which the owner, agent, or manager or each of them is liable under this Act, the owner or agent shall not be liable to any penalty if he proves to the satisfaction of the court—

(*a*) that he was not in the habit of taking and did not in respect of the matters in question take any part in the management of the mine; and

(*b*) that he had made all the financial and other provision necessary to enable the manager to carry out his duties; and

(*c*) that the offence was committed without his knowledge, consent, or connivance.

(2) Save as above provided, it shall not be a defence in any proceedings brought against the owner or agent of a mine under this Act in respect of such an offence as aforesaid that a manager of the mine has been appointed in accordance with this Act.

(3) Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable [2] for him to make provision.

(4) Nothing in this section shall be construed as preventing proceedings being instituted, in the first instance, against the manager for any offence for which the manager of the mine is liable under this Act.

(5) No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State; and in the case of any offence of which the owner, agent, manager, or under-manager of a mine is not guilty if he prove that he had taken all reasonable means to prevent the commission thereof, an inspector shall not institute any prosecution against

such owner, agent, manager, or under-manager, if satisfied that he had taken such reasonable means as aforesaid.[3]

(6) A prosecution shall not be instituted against a coroner[4] for any offence under this Act except with the consent in writing of the Secretary of State.

(7) If a boy or girl was employed on the representation of his or her parent or guardian that he or she was of an age at which his or her employment would not be in contravention of this Act, and under the belief in good faith that he or she was of that age,[5] or if a person has been employed in any capacity or in any manner on his representation that he fulfilled the conditions as to age, experience,[6] and otherwise necessary for such employment, and under the belief in good faith that such representation was true, the owner, agent, or manager of the mine and employer shall be exempted from any penalty, and the parent or guardian or the person making such representation, as the case may be, shall in respect of the misrepresentation, be guilty of an offence against this Act.

(8) The owner of a mine shall not be liable to an action for damages[1] as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable[2] to avoid or prevent the breach.

[1] The civil and criminal liability of owners and agents under this section and of s. 75 has already been dealt with, see s. 2, n. 1, *ante*, p. 585, and the notes to s. 75, *ante*, p. 635.

[2] The practicability (as under the general and special rules of the Act of 1887) will be measured by the nature of the work and the person liable to perform it: Watkyns *v.* Naval Colliery Co., 1911, 2 K. B., p. 185; Butler (or Black) *v.* Fife Coal Co., 1912, A. C. p. 163; and see the notes above cited.

[3] As to an information being laid by the agent of an inspector, see Foster *v.* Fyfe, 1896, 2 Q. B. 104, cited *post*, p. 722.

[4] As to the duties of a coroner, see s. 84, *ante*, p. 642.

[5] See ss. 91 and 92, *ante*, p. 647.

[6] See s. 73, *ante*, p. 634.

Summary proceedings for offences, fines, &c. [1887, ss. 61, 62, 69.]

103.—(1) All offences under this Act not declared to be misdemeanours, and all fines under this Act, and all money and costs by this Act directed to be recovered as fines, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts:[1] Provided that—

(i) It shall be sufficient to allege that the mine is a mine within the meaning of this Act, without more:

(ii) The court shall, if required by either party, cause minutes of the evidence to be taken and preserved.

(2) Where proceedings are taken before a court of summary

[New provisions are marked by a line.]

jurisdiction in respect of an offence against this Act alleged to have been committed in or with reference to a mine, a person who is the owner, agent, or manager of any mine, or a person employed in a mine, or the father, son, or brother, or father-in-law, son-in-law, or brother-in-law, of such owner, agent, manager, or person, or who is an officer of any association of persons so employed, or who is a check-weigher appointed under the Coal Mines Regulation Acts, 1887 to 1905,[2] or who is a director of a company which is the owner of a mine, shall not, except with the consent of both parties to the case, act as a member of the court.

[1] As to the meaning of "Summary Jurisdiction Acts," and "court of summary jurisdiction," see s. 13 of the Interpretation Act, 1889.

[2] See *post*, pp. 679–681.

Appeal to quarter sessions. [1887, s. 63.]

104. If any person feels aggrieved by any summary conviction under this Act by which imprisonment or a fine amounting to or exceeding one half the maximum fine, is adjudged, he may appeal therefrom to quarter sessions.[1]

[1] As to the power of Quarter Sessions to state a case for the opinion of the High Court, see R. *v.* Handley, 9 L. T. (N. S.) 827, a decision under a former Act.

Application of fines. [1887, s. 70.]

105.—(1) Where a fine is imposed under this Act for neglecting to send a notice of any accident or for any offence against this Act which has occasioned loss of life or personal injury, the Secretary of State may (if he thinks fit) direct such fine to be paid to or distributed among the persons injured, and the relatives of any persons whose death may have been occasioned by the accident, or offence, or among some of them :

Provided that—

(i) Such persons did not, in his opinion, occasion or contribute to occasion the accident, and did not commit and were not parties to committing the offence :

(ii) The fact of the payment or distribution shall not, in any way, affect or be receivable as evidence in any legal proceeding relative to or consequential on the accident or offence.

(2) Save as aforesaid—

All fines recovered in England or Scotland under this Act shall be paid into the Exchequer ;

All fines recovered in Ireland under this Act shall be applied in manner directed by the Fines Act (Ireland), 1851, and any Act amending the same.

14 & 15 Vict. c. 90.

Report of result of proceedings

106. Where the owner, agent, or manager of a mine has taken proceedings under this Act against any person employed in or about

[New provisions are marked by a line.]

a mine in respect of an offence against this Act, he shall, within twenty-one days after the hearing of the case, report the result thereof to the inspector of the division. against workmen. [1887, s. 66.]

107.—(1) The High Court, whether any other proceedings have or have not been taken, may, on the application of the Attorney-General, prohibit by injunction the working of any mine or any part of a mine in which there is such a contravention or non-compliance with the provisions of this Act, or the general regulations made thereunder,[1] as appears to the Court calculated to endanger the safety of persons employed in the mine or part, and may award such costs in the matter as the Court think just, but this provision shall be without prejudice to any other remedy permitted by law for enforcing the provisions of this Act. Power to prohibit working of mine in which there is a contravention of the provisions of Part II. [1887, s. 16, (3) & (4).]

(2) Written notice of the intention to apply for such injunction in respect of any mine or part of a mine shall be given to the owner, agent or manager of the mine not less than ten days before the application is made.

[1] See s. 86, *ante*, p. 644.

108. A court of summary jurisdiction may, on complaint by an inspector, and on being satisfied that any part of the machinery or plant used in a mine (including a steam boiler used for generating steam) is in such a condition or so placed that it cannot be used without danger to life or limb, prohibit its use, or, if it is capable of repair or alteration, prohibit its use until it is duly repaired or altered. Prohibition of use of dangerous machinery.

Miscellaneous.

109.—(1) The regulations contained in the Third Schedule to this Act[1] (which relate to the care and treatment of horses and other animals in mines) shall be observed in every mine. Protection of animals in mines.

(2) Any person who acts in contravention of or fails to comply with any of those regulations shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of those regulations by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act unless he proves that he has taken all reasonable means, by publishing and to the best of his power enforcing those regulations, to prevent that contravention or non-compliance.[2]

(3) The Secretary of State shall appoint fit persons to be special inspectors for the purpose of examining into the care and treatment of the horses and other animals used in mines, and of enforcing the provisions of this Act relating to horses and other animals, and any person appointed as a special inspector under this provision shall so

[New provisions are marked by a line.]

far as necessary for the exercise of his powers and the performance of his duties as such inspector have the same powers as are given to and be subject to the same obligations and restrictions as inspectors of mines under the foregoing provisions of this Act, and the provisions of this Act relating to the obstruction of inspectors shall apply as if references to inspectors included references to special inspectors.[3]

[1] See *post*, p. 673.
[2] See s. 75, n. 3, *ante*, *p.* 635, and s. 2, n. 1, *ante*, p. 585.
[3] See ss. 98–100, *ante*, pp. 651–653.

Application of Workmen's Compensation Act in case of men being trained for or engaged in rescue work.

110.—(1) Where provision has been made in pursuance of regulations under this Act, or under any order which has effect as if made under this Act, for the formation or training of a rescue brigade, any accident caused to a workman employed in or about a mine who is with the consent of his employer being trained as a member of the rescue brigade, and arising out of and in the course of his training, shall, for the purposes of the Workmen's Compensation Act, 1906, be deemed to arise out of and in the course of his employment in the mine.

6 Edw. 7. c. 58.

(2) Any workmen engaged in any rescue work or ambulance work at a mine shall, for the purposes of the Workmen's Compensation Act, 1906, be deemed while so engaged to be employed by the owner of the mine.

Application of certain provisions to railway sidings. 63 & 64 Vict. c. 27. [1906, s. 3.]

111.—(1) Where any line or siding, not being part of a railway within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900,[1] is used in connexion with a mine the provisions of this Act with respect to—

(*a*) returns and notification of accidents; and

(*b*) general and special regulations;

shall have effect as if the line or siding were part of the mine, but, as respects such returns and notification of accidents, shall apply only in the case of accidents to persons employed by or on behalf of the owner of the mine.

(2) If any such line or siding is used in connexion with more than one mine belonging to different owners, the foregoing provisions shall have effect as if the line or siding were a separate mine.[2]

[1] S. 16 of that Act defines "Railway" as "Any railway used for the purpose of public traffic, whether passenger, goods or other traffic, and any works of the railway company connected with the railway."

[2] "Owner" is defined (s. 122, *post*, p. 661) as the immediate proprietor, lessee or occupier of any mine or of any part thereof. Each of the different owners would therefore be liable to carry out the provisions affecting the line.

[New provisions are marked by a line.]

112. The salary and remuneration of inspectors and examiners under this Act and all other expenses incurred by the Secretary of State in the execution of this Act, to such an amount as may be sanctioned by the Treasury, shall be defrayed out of moneys provided by Parliament.

Payment of salaries and expenses. [1887, ss. 28 (3), 31 (1), 39 (5).]

113. If any question arises (otherwise than in legal proceedings) whether a mine is a mine to which this Act or the Metalliferous Mines Regulation Acts, 1872 and 1875, apply, the question shall be referred to the Secretary of State, whose decision thereon shall be final.[1]

Power of Secretary of State to determine questions. 35 & 36 Vict. c. 77. 38 & 39 Vict. c. 39. [1887, s. 71.]

[1] A corresponding provision is contained in the Met. Mines Act, 1872; see s. 39, *post*, p. 723. As to the mines to which the Coal Mines Acts and the Met. Mines Acts respectively apply, see s. 1 of this Act, *ante*, p. 584, and Met. Mines Act, 1872, s. 3, *post*, p. 695.

114. Any order of, or any exemption granted by, the Secretary of State under this Act may be from time to time revoked or altered by the Secretary of State, either unconditionally or subject to such conditions as he may see fit, and shall be signed by the Secretary of State or an under secretary or assistant under secretary.

Powers of Secretary of State as to making and revoking orders. [1887, s. 72.]

115.—(1) The Secretary of State may purchase and hold land (including any easements in or over land) in the United Kingdom for the purpose of any experiments or tests which he may think it desirable to carry out in connexion with matters relating to the safety or health of persons employed in or about mines.

Power of Secretary of State to purchase land.

(2) For the purpose of the purchase of land under this section, sections two and twenty of the Military Lands Act, 1892, as amended by the Military Lands Act, 1900, shall apply as they apply for the purpose of the purchase of land by the Secretary of State under that Act as so amended.

55 & 56 Vict. c. 43. 63 & 64 Vict. c. 56.

116. Any matter which under this Act is to be settled in manner provided by this Act for settling disputes shall be referred to such one of the panel of referees appointed under this Act as may be selected in manner provided by rules made for the purpose, and the decision of the referee shall be final:

Provided that no such matter shall be so referred, unless the party making the objection or refusing compliance has served notice on the other party within the prescribed time and in the prescribed manner, and all objections not made within such time and in such manner shall be disregarded.

Manner of settling disputes.

117.—(1) Such number of persons as may be appointed by the reference committee herein-after mentioned shall form a panel of persons to act as referees for the purposes of this Act.

Appointment of referees.

[New provisions are marked by a line.]

(2) The reference committee may make rules as to the mode in which the referee in any particular case is to be selected, the procedure before a referee, and the cost of the proceedings before a referee (including the remuneration of the referee).

(3) The reference committee shall consist of the Lord Chief Justice of England, the Lord President of the Court of Session and such person specially qualified by eminence in mining knowledge as the Lord Chief Justice and the Lord President may select.

Procedure for ascertaining views of workmen.

118. The Secretary of State may make rules prescribing the procedure to be observed for ascertaining and certifying the views of the workmen, or any part of the workmen, in any mine, or any class of mines, in any case where those views are required to be ascertained for any of the purposes of this Act.

Provisions as to exemptions granted by inspectors.

119. Any exemption granted by the inspector of a division under this Act shall be in writing and signed by him. Any such exemption may—

(*a*) be granted either absolutely or subject to such restrictions and conditions as the inspector thinks fit to impose;

(*b*) be revoked at any time by the inspector of the division for the time being.

Service of notices. [1887, s. 73.]

120. All notices under this Act shall be in writing and all notices and documents required by this Act to be served or sent by or to an inspector may be either delivered personally, or served and sent by post; and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post.

Pulling down or defacing notices. [1887, s. 58.]

121. Every person who pulls down, injures, or defaces any abstract, notice, summary, proposed regulations, or regulations, when posted up in pursuance of the provisions of this Act, or any notice posted up in pursuance of the regulations of the mine, shall be guilty of an offence against this Act.

Interpretation. [1887, s. 75.]

122. In this Act, unless the context otherwise requires,—

"Mine" includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine,[1] but does not include any part of such premises on which any manufacturing process is carried on other than a process ancillary to the getting, dressing or preparation for sale of minerals:

[New provisions are marked by a line.]

"Main airway" means an airway commencing from, or terminating at, a shaft or outlet to the surface, or any airway from which a split is taken to ventilate any district of the mine, or into which a split so taken returns:

"Ventilating district" means any part of a seam having an independent intake airway commencing from a main intake airway and an independent return airway terminating at a main return airway:

"Office at the mine" means an office on the surface of the mine:

"Small mine" means a mine in which the total number of persons employed below ground does not exceed thirty:

"Owner," when used in relation to any mine, means any person or body corporate who is the immediate proprietor or lessee, or occupier of any mine, or of any part thereof, and in the case of a mine the business whereof is carried on by a liquidator or receiver includes such liquidator or receiver, but does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine; [2] but any contractor for the working of any mine, or any part thereof, shall be subject to this Act in like manner as if he were an owner, but so as not to exempt the owner from any liability: [3]

"Agent," when used in relation to any mine, means any person appointed or acting as the representative of the owner in respect of any mine, or of any part thereof, and as such superior to a manager appointed in pursuance of this Act:

"Prescribed" means prescribed by the Secretary of State:

"Boy" [4] means a male under the age of sixteen years:

"Girl" [4] means a female under the age of sixteen years:

"Woman" [4] means a female of the age of sixteen years or upwards.

[1] Where a mine was connected by a private line with a main line of railway, a place on the private line, 800 yards from the mine, was held to be "adjacent and belonging:" Anderson *v.* Lochgelly, &c., Co., 7 F. 187, a decision under the Workmen's Compensation Act, 1897; and see s. 110, *ante*, p. 658.

[2] The definition of "owner" includes any one of two or more co-owners: R. *v.* Brown, 7 E. & B. 757, decided under a former Act. A tenant under an agreement is a "lessee," and therefore an "owner" within this definition: Stott *v.* Dickinson, 34 L. T. (N. S.) 291, decided under the Act of 1872. But a person who has been a lessee, but whose lease has expired, is not: *ib.* Nor is a person who "merely receives a royalty, rent, or fine from a mine," an

[New provisions are marked by a line.]

owner, because he is also a lessee: Arkwright *v.* Evans, 49 L. J. M. C. 82, decided under s. 41 (*post*, p. 724) of the Met. Mines Act. The words "and not interested in the minerals of the mine" apply only to the words "or is merely the owner of the soil," and not to either of the two classes of persons previously excluded from the definition of "owner": Evans *v.* Mostyn, 2 C. P. D. 552; also decided under s. 41 of the Met. Mines Act. "Interested in the minerals" means having a pecuniary interest: Arkwright *v.* Evans, *sup.* Where the shaft of an abandoned mine contains water, and is used as a public well, the local authority are not the "owners": Knuckley *v.* Redruth, &c., Council, 1904, 1 K. B. 382. See, further, *ante*, pp. 585, 635.

[3] The words "contractor for the working of any mine" do not include a former lessee who covenanted with his lessor to fill up the pits on their being discontinued or becoming useless: Stott *v.* Dickinson, *sup.*

[4] See ss. 91 and 92, *ante*, pp. 647, 648.

Saving for existing managers, firemen, and owners and agents.

123. Nothing in this Act shall—

(*a*) prevent any person who is less than twenty-five years of age from acting as manager of a mine, if he was lawfully so acting at the date of the passing of this Act; or

(*b*) prevent any person acting as a fireman, examiner, or deputy, notwithstanding that he—

(i) neither is the holder of a first or second-class certificate of competency under this Act, nor is twenty-five years of age or upwards and has had at least five years' practical experience underground in a mine; or

(ii) has not obtained a certificate of his ability to measure the quantity of air in an air current,

if he was employed as a fireman, examiner, or deputy at the date of the passing of this Act;

(*c*) prevent any owner or agent of a mine taking part in the technical[1] management of the mine, notwithstanding that he is not qualified under this Act to be a manager, if he was taking part in the technical management of the mine at the time of the passing of this Act.

[1] See s. 2, n. 5, *ante*, p. 588.

Application to Scotland. [1887, s. 76.]

124. This Act shall apply to Scotland subject to the following modifications:—

(1) "Attorney-General" means Lord Advocate; "information" means complaint; "summons" means citation; "High Court" means Court of Session; "injunction" means interdict; "county court" means sheriff court; "local education authority" means school board; "licensed premises as defined by the Licensing (Consolidation) Act, 1910," means certificated premises within the meaning

[New provisions are marked by a line.]

of the Licensing (Scotland) Act, 1903; "section ninety-one of the Public Health Act, 1875," means section sixteen of the Public Health (Scotland) Act, 1897; "receiver" includes a trustee in bankruptcy; "attending on subpœna before a court of record" means attending on citation the High Court of Justiciary, and any reference to a Court of Record shall be construed accordingly; "master of the Supreme Court" means auditor of the sheriff court; "county court judge" means sheriff; "London Gazette" means "Edinburgh Gazette": 3 Edw. 7 c. 25. 60 & 61 Vict. c. 38.

(2) The provision relating to an appeal to quarter sessions shall not apply.

125. This Act shall apply to Ireland subject to the following modifications:— Application to Ireland. [1887, s. 77.]

(1) In hearing and determining a charge under this Act, a court of summary jurisdiction elsewhere than in the Dublin metropolitan police district shall be constituted of two or more justices of the peace or of a resident magistrate, with or without other justices, sitting in petty sessions; and a resident magistrate means a magistrate appointed pursuant to the Constabulary (Ireland) Act, 1836: 6 & 7 Will. 4.

(2) Section one hundred and seven of the Public Health (Ireland) Act, 1878, shall be substituted for section ninety-one of the Public Health Act, 1875: c. 36. 41 & 42 Vict. c. 52.

(3) "Police or stipendiary magistrate" means resident magistrate; "master of the Supreme Court" means a taxing master of the High Court of Justice in Ireland; "London Gazette" means Dublin Gazette; "Attorney-General" means Attorney-General for Ireland:

(4) The Licensing Act, 1872, shall be substituted for the Licensing (Consolidation) Act, 1910. 35 & 36 Vict. c. 94.

126. The enactments mentioned in the Fourth Schedule to this Act[1] are hereby repealed to the extent mentioned in the third column of that Schedule: Repeal. [1887, ss. 78, 79, 81, 83 & 84.]

Provided that—

(*a*) Nothing in this repeal shall affect any order made by the Secretary of State or any certificate of competency or of service granted, or having effect as if granted, under any enactment repealed by this Act which is in force immediately before the commencement of this Act, but every such order and certificate shall have effect as if made or granted under this Act;[2] and the register of

[New provisions are marked by a line.]

holders of certificates, and the other registers which at the commencement of this Act are kept in pursuance of the Acts hereby repealed, shall be deemed to be registers or parts of registers kept in pursuance of this Act:

(*b*) Nothing in this repeal shall affect any special rules which at the commencement of this Act are in force under any Act hereby repealed in any mine, but such rules shall, until regulations affecting the mine and revoking such rules have been made under this Act, have effect as if they were the regulations of the mine under this Act:[3]

(*c*) Nothing in this repeal shall affect the tenure of office of any inspector appointed under any enactment repealed by this Act:

(*d*) Any document referring to any Act repealed by this Act, or to any enactment thereof, shall be construed to refer to this Act, and to the corresponding enactments thereof:

(*e*) This Act shall apply to offences under such of the provisions of the Coal Mines Regulation Acts, 1887 to 1908, as are unrepealed by this Act[4] in like manner as if they were offences against this Act, and expressions in those provisions shall have the same meaning as in this Act.

[1] See *post*, p. 675.

[2] This provision applies even though the order is one which could not have been made under the present Act: Dickinson *v.* Handsley, 60 L. T. (N. S.) 567, cited *post*, p. 679, decided under the corresponding section, 29, of the Act of 1887.

[3] See s. 89, *ante*, p. 646.

[4] *I.e.* ss. 1, 3, 12 to 15 of the Act of 1887, and the Coal Mines Regulation Act, 1908, *post*, pp. 676 *et seq.*

Short title and commencement.

127.—(1) This Act may be cited as the Coal Mines Act, 1911.

(2) This Act shall, except as otherwise provided, come into operation on the first day of July nineteen hundred and twelve.

[New provisions are marked by a line.]

SCHEDULES.

FIRST SCHEDULE.

Sections 18 and 22.

Form of Annual Return.

This Form must be correctly filled up by the Owner, Agent or Manager, and sent to the Inspector of the Division on or before 21st January, every year.

Part A.

Year ending 31st December, 19 .

Name of Mine_____

Situation of Mine_____

County_____

Postal Address of Mine_____

Name and Address of Owner } _____

Name of Manager_____

No. of his Certificate_____

Name of Under-Manager_____

No. and Class of his Certificate_____

PART A.—*continued.*

RETURN of Persons ordinarily employed, the Quantity of Minerals gotten, and the Number of Days in each Month on which Coal or Ironstone has been drawn, during the Year 19 .

N.B.—The Return must comprise *all* persons ordinarily employed *on the mine premises* (including Officials, Storekeepers, Clerks, &c.).

Name or Number of Pit.	Underground.			Above Ground (including Persons Employed on Sidings at the Pit, and those on Private Branch Railways and Tramways, and in Washing Coal on Premises adjacent to and belonging to the Mine).						Gross Total of Persons Employed Underground and Above Ground in connection with the Mine.
	Males.			Females.			Females.			Total Above Ground.
	Ages, 14 to 16.	Ages, Above 16.	Total Underground.	Ages, 13 to 14.	Ages, 14 to 16.	Ages, Above 16.	Ages, 13 to 14.	Ages, 14 to 16.	Ages, Above 16.	
Totals . .										

PART A.—*continued.*

RETURN of persons ordinarily employed, &c.—*continued.*

Name or Number of Pit.	Statute Tons of Minerals gotten.											Number of Days in each Month on which Coal or Ironstone has been drawn.												
	Coal,° including Small or Slack.		Fireclay.		Ironstone (Raw).		Oil Shale.		Other Minerals.			Total Tons.	January.	February.	March.	April.	May.	June.	July.	August.	September.	October.	November.	December.	Total Days.
	Amount.	Value at the Pit Mouth.	Amount.	Value at the Pit Mouth.	Amount.	Value at the Pit Mouth.	Amount.	Value at the Pit Mouth.	Amount.	Value at the Pit Mouth.	Description.														
Totals . .																								

° The total Coal won, *including Coal used for Colliery consumption*, must be given.

PART B.

PARTICULARS OF VENTILATION.

Name of the Mine _____

Name or Number of Pit.	Name of Seam.	Mode of Ventilation, with Description.	Diameter or Dimensions and Depths of Downcast and Upcast Shafts.				Number of Splits and Quantity.		Average Total Quantity of Fresh Air per minute.
			Downcast.		Upcast.				
			Diameter or Dimensions in feet.	Depth in feet.	Diameter or Dimensions in feet.	Depth in feet.	Splits.	Quantity in cubic feet per minute.	Cubic feet.
							The information in these columns is to be obtained from the last measurements previous to the 31st December.		

PART C.

PARTICULARS of EXPLOSIVES, COAL-CUTTING MACHINES, CONVEYORS and SAFETY LAMPS, *used* during the Year ended 31st December 19 .

I.—EXPLOSIVES.

NAME OF EXPLOSIVE.	Quantity used. (lbs.)	Estimated number of shots fired.			
		By Electricity.	By Fuse.	By Squibs.	TOTAL.

The number of miss-fire shots :—

1. With Electricity – – – –
2. With Fuse – – – – –
3. Otherwise – – – – –

Total – – – –

II.—COAL-CUTTING MACHINES AND CONVEYORS.

DESCRIPTION.	Number driven by		Statute tons cut by						Number of Conveyors at Coal Face.
			Electricity.			Compressed Air.			
	Electricity.	Compressed air.	Coal.	Other Mineral.		Coal.	Other Mineral.		
				Tons.	Description.		Tons.	Description.	

III.—SAFETY LAMPS.

Name and Description* of Lamp. (*No. of Gauzes and whether Shielded or not.)	Number in Use.	Method of Locking.				Kind of Illuminant.				
		Lead Rivet.	Magnetic.	Screw.	Other.	Colza or Colza and Petroleum.	Petroleum.	Volatile Spirit.	Electricity.	Other Illuminant.

State the method of lighting the lamps, *e.g.*, by electricity, internal igniters, or otherwise.

Part D.

Type and Aggregate Horse-Power of Electrical Apparatus.

1.—System of Supply (whether continuous current or alternating current – – – – Voltage of Supply – – – Periodicity (if alternating current) – – – – – Source of Supply – – –	
2.—Voltage at which current is used for— Lighting – – – – Power – – – –	
3.—Aggregate H.P. of Motors installed on surface for— Winding – – – – Ventilation – – – Haulage – – – – Coal washing or screening – Miscellaneous – – –	
Total H.P.	
4.—Aggregate H.P. of Motors installed below ground for— Haulage – – – – Pumping – – – – Portable Machinery – – Miscellaneous – – –	
Total H.P. – –	
5.—Total H.P. (addition of 3 and 4)	

(Signed)_____ Owner, Agent, or Manager.

Date_____

SECOND SCHEDULE.

Sections 86 and 87.

PART I.

PROCEDURE FOR MAKING GENERAL REGULATIONS.

(1) Before the Secretary of State makes an order he shall publish in such manner as he may think best adapted for informing persons affected, notice of the proposal to make the order and of the place where copies of the draft order may be obtained, and of the time (which shall not be less than thirty days) within which any objections made with respect to the draft order by or on behalf of persons affected must be sent to the Secretary of State.

(2) Every objection must be in writing and state—

(*a*) the specific grounds of objection ;

(*b*) the omissions, additions, or modifications asked for.

(3) The Secretary of State shall consider any objection made by or on behalf of any persons appearing to him to be affected which is sent to him within the required time, and he may, if he thinks fit, amend the draft order, and the foregoing provisions shall apply to the amended draft in like manner as they apply to the original draft.

(4) If after the publication of the notice with respect to any such draft order (whether an original or amended draft), any general objection as herein-after defined is made within the required time with respect to the draft and not withdrawn, the order shall not be made by the Secretary of State until that objection has been referred to such one of the panel of referees appointed under this Act as may be selected in manner provided by the rules made for the purpose.

If on any such reference the referee considers that the draft order should be varied to meet the objection, he shall recommend any variation which he considers necessary or expedient, and effect shall be given to those recommendations in the order, if made.

(5) The reference committee may appoint any person or persons possessing legal or special knowledge to act as assessor or assessors to the referee.

(6) If the Secretary of State considers that any objection, though not a general objection, is of such a character that it is desirable to refer it to a referee, he may so refer it, and in that case the foregoing provisions shall apply as in the case of a general objection.

(7) If any objection, though not a general objection, is made on behalf of the owners of mines of any particular class or mines in any separate area, and it is alleged in the objection that having regard to the special natural conditions or special methods of working in mines of that class or mines in that area the proposed regulations ought not to apply to those mines, the Secretary of State shall, unless he is of opinion that the objection

is frivolous, refer it to a referee, and in that case the foregoing provisions shall apply as in the case of a general objection.

(8) For the purposes of this section a "general objection" means an objection made either by or on behalf of owners of mines employing not less than one-third of the total number of men employed at the mines affected by the proposed order, or, if the order contains different provisions for different classes of mines, of the total number of men employed in any such class of mines, or by or on behalf of not less than one-third of the total number of men so employed.

The number of men employed shall be calculated in accordance with the returns for the last preceding year sent by owners of mines to the inspectors in pursuance of the provisions of this Act.[1]

[1] See s. 18, *ante*, p. 598.

Part II.

Procedure in case of Special Regulations sent to Secretary of State for Approval.

(1) Where any special regulations have been sent under this Act to the Secretary of State for approval he shall consider the regulations and either approve or disapprove the same.

Where the Secretary of State disapproves the special regulations, no further action shall be taken in the matter.

Before the Secretary of State approves the special regulations there shall be published, in such manner as he may think best adapted for informing persons affected, notice of the proposal to make the regulations and of the place where copies of the draft regulations may be obtained and of the time (which shall not be less than thirty days) in which any objections with respect to the draft regulations made by or on behalf of persons affected must be sent to the Secretary of State.

(2) Every objection must be in writing and state—

(*a*) the specific grounds of objection;

(*b*) the omissions, additions, or modifications asked for.

(3) The Secretary of State shall consider any objection made by or on behalf of persons appearing to him to be affected which is sent to him within the required time, and he may, before approving the special regulations, require such amendments to be made therein as he may think fit.

(4) If the owner or a majority of workmen who have sent any objection to any special regulations sent for approval feel aggrieved by the refusal of the Secretary of State to give effect to their objection; the objection shall be referred to such one of the panel of referees appointed under this Act as many be selected in manner provided by the rules made for the purpose.[1]

If, on any such reference, the referee considers that the regulations

[1] The right of reference is only given in the case of objections. The right of the Secretary of State to reject proposed regulations in the first instance is absolute.

should be varied to meet the objection, he shall recommend any variation which he considers necessary or expedient, and the Secretary of State, before approving the regulations, shall require that variation to be made.

THIRD SCHEDULE.

Sections 86 and 109.

1. No horse shall be taken underground until it is four years old and until it has been tested by a duly qualified veterinary surgeon in the prescribed manner and certified to be free from glanders.

2. All horses underground shall, when not at work, be housed in properly-constructed stables, and in stalls of adequate size.

3. All stables in use shall be separated from any road used for travelling or haulage of minerals, and shall be continuously and thoroughly ventilated with intake air, and cleaned daily and kept in a sanitary condition, and all roofs, walls, and partitions of any stables shall, unless painted or made of slate, tiles, glazed brick or iron, be limewashed at least once in every three months.

4. Competent persons, herein-after referred to as "horse-keepers," shall be appointed in writing by the manager to have the care of the horses used underground while in the stables, and of the stables, in the proportion of at least one horse-keeper to every fifteen horses.

5. A sufficient supply of wholesome food and pure water shall be provided daily for every horse while in the stable and while at work.

6. A sufficient supply of suitable medicines, ointments, and dressings, and a suitable appliance or appliances for the destruction of horses requiring to be destroyed, shall be provided and kept readily available for use.

7. No horse shall be worked, or allowed by the horse-keeper to go out to work, in an unfit condition, or improperly shod, or otherwise than with harness properly fitting and in good condition, including a guard for the eyes.

8. The driver having charge of any horse shall remain in charge of the horse during the whole time that it is at work in his shift, and, unless otherwise ordered, shall at the end of the shift return the horse to the horse-keeper at the stable.

9. No blind horse shall be worked in a mine.

10. The driver having charge of any horse shall at once report to the official under whose direction he works any injury to or overworking of the horse or any insufficiency in the supply of food or water, and any case in which the horse or harness rubs against the roof or sides, or in which the harness is defective.

11. The horse-keeper shall, as soon as practicable after the return of any horse to the stable, examine the horse and its harness, attend to any injury to the horse, and clean and groom it himself, or cause it to be cleaned and groomed.

12. Every official under whose direction the driver of any horse works and every horse-keeper shall at once report to the manager or under-manager any case of sickness in or injury to or any marks of ill-treatment on or any overworking of any horse coming to his notice, and any defect in the harness likely to cause pain or injury to the horse, and no horse with respect to which any such report is made shall be allowed to go out to work until authority in that behalf is given by the manager or under-manager.

13. Every horse-keeper shall keep a record in a book to be kept at the mine of all horses under his care, and shall make a daily report therein as to the condition of each horse, the driver in whose charge it has been, the time at which it was taken from the stables, and the time at which it was returned thereto.

14. Every book kept by a horse-keeper under the foregoing provisions of this schedule shall be open to inspection by any special inspector.

15. The manager shall, by himself or by some competent person appointed by him for the purpose, exercise such personal supervision over all horse-keepers, drivers, and other persons employed in connection with the horses used in the mine as is necessary to secure that the provisions of this Act relating to the care and treatment of horses in mines are observed in the mine.

16. The owner, agent, or manager shall, as part of the return required to be made annually to the inspector of the division, furnish a statement showing the number of horses used in the mine, the number which have died during the year from injury by accident or from disease, or which required to be destroyed in consequence of injury or disease, and the number of other cases of injury or ill-treatment reported to the manager under the provisions of this schedule.

17. In this schedule the expression "horse" includes pony, mule, and donkey.

FOURTH SCHEDULE.

Section 126.

ENACTMENTS REPEALED.

Session and chapter.	Short title.	Extent of repeal.
50 & 51 Vict. c. 58.	The Coal Mines Regulation Act, 1887.	The whole Act, except sections one, three, twelve, thirteen, fourteen, and fifteen.
59 & 60 Vict. c. 43.	The Coal Mines Regulation Act, 1896.	The whole Act.
63 & 64 Vict. c. 21.	The Mines (Prohibition of Child Labour Underground) Act, 1900.	The whole Act, so far as it relates to mines to which this Act applies.
3 Edw. 7. c. 7.	The Coal Mines Regulation Act (1887) Amendment, Act, 1903.	The whole Act.
6 Edw. 7. c. 53.	The Notice of Accidents Act, 1906.	Sections one, two, three, and five, so far as they relate to mines to which this Act applies.
7 Edw. 7. c. 10.	The Employment of Women Act, 1907.	Section one, so far as it relates to the Coal Mines Regulation Act, 1887.
10 Edw. 7. & 1 Geo. 5. c. 15.	The Mines Accidents (Rescue and Aid) Act, 1910.	The whole Act, so far as it relates to mines to which this Act applies.

b.—COAL MINES REGULATION ACT, 1887—COAL MINES (CHECK WEIGHER) ACT, 1894—COAL MINES (WEIGHING OF MINERALS) ACT, 1905.

THE COAL MINES REGULATION ACT, 1887.[1]

(50 & 51 *Vict. c.* 58.)

An Act to consolidate with amendments the Coal Mines Acts, 1872 and 1886, and the Stratified Ironstone Mines (Gunpowder) Act, 1881. [16th September, 1887.]

[1] The following are the only sections of this Act not repealed by the Act of 1911: see the Fourth Schedule on the preceding page.

Preliminary.

Short title.

1. This Act may be cited as the Coal Mines Regulation Act, 1887.

Application of Act.

3. This Act shall apply to mines of coal, mines of stratified ironstone, mines of shale, and mines of fire-clay; and in this Act, unless the context otherwise requires, the word "mine" means a mine to which this Act applies.[1]

[1] This section is identical with s. 1 of the Act of 1911. See notes 1 and 2 to that section, *ante*, p. 584, and s. 126 (e), *ante*, p. 664.

Payment of persons employed in mines by weight.

12. (1.) Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them,[1] those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten,[2] and the mineral gotten by them shall be truly weighed[3] at a place as near to the pit mouth as is reasonably practicable.

Provided[4] that nothing in this section shall preclude the owner agent or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten,[5] or in respect of any tubs baskets or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner agent or manager of the mine on the

one hand, and the persons employed in the mine on the other,[7] or by some person appointed in that behalf by the owner agent or manager, or (if any check weigher is stationed for this purpose as herein-after mentioned), by such person and such check weigher, or in case of difference by a third person to be mutually agreed on by the owner agent or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a court of quarter sessions within the jurisdiction of which any shaft of the mine is situate.

(2.) If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, this section, he shall be guilty of an offence against this Act;[8] and in the event of any such contravention or non-compliance by any person whomsoever, the owner agent and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means[9] by publishing and to the best of his power enforcing the provisions of this section to prevent the contravention or non-compliance.

(3.) Where it is proved to the satisfaction of a Secretary of State, in the case of any mine or class of mines employing not more than thirty persons underground, to be expedient that the persons employed therein should, upon the joint representation of the owner or owners of any such mine or class of mines and the said persons, be paid by any method other than that provided by this Act, such Secretary of State may, if he think fit, by order allow the same either without conditions or during the time and on the conditions specified in the order.[10]

[1] This section only applies where the amount of wages depends directly upon the weight of mineral gotten, and has no application where the wages depend on the amount of work done, as where the workman is paid by the yard irrespective of the character of the material excavated: see Humble *v.* Humphreys, 1902, A. C. 207, a decision of the J. C. on s. 38 (1) of the New South Wales Coal Mines Regulation Act, 1896, which is identical with s. 12 (1) of the present Act.

[2] As to "mineral contracted to be gotten," see *infra*, n. 5. These words do not preclude an owner from dismissing a collier who, contrary to express instructions, continues to send up an undue proportion of dust: Chell *v.* Hall, 12 T. L. R. 408.

[3] The direction to weigh applies to everything sent up in the tub, whether consisting of "mineral contracted to be gotten" or not: Kearney *v.* Whitehaven Colliery Co., 1893, 1 Q. B. at p. 708, *per* Lord Esher. Subject to the proviso with regard to deductions (see n. 4, *infra*), this section renders it obligatory in all cases to pay wages according to weight: Netherseal Colliery Co. *v.* Bourne, 14 A. C. 228; Kearney *v.* Whitehaven Colliery Co., 1893, 1 Q. B. 700.

[4] Under this proviso deductions may be agreed upon in respect of (1) substances other than the mineral contracted to be gotten sent out of the mine with the mineral contracted to be gotten, and (2) tubs, &c., improperly filled.

No other deductions are lawful, and no agreement purporting to authorise them is valid. And the permitted deductions cannot be made unless the provisions as to the mode of determining them and otherwise are complied with: Netherseal Colliery Co. *v.* Bourne, 14 A. C. 228; Kearney *v.* Whitehaven Colliery Co., 1893, 1 Q. B. 700. Deductions improperly made may be recovered by the miner by action: Netherseal Colliery Co. *v.* Bourne, *sup.*; Brace *v.* Abercarn Colliery Co.; Huggins *v.* London, &c., Co., 1891, 2 Q. B. 699. But a contract of hiring and service providing for illegal deductions is not otherwise void. Although, therefore, the miner may recover the sums improperly deducted, he is not at liberty, on that ground, to terminate his engagement without giving such notice as may have been stipulated for, or otherwise to break his contract of service: Kearney *v.* Whitehaven Colliery Co., *sup.*

[5] "Mineral contracted to be gotten" means the kind of mineral (*i.e.*, coal, ironstone, shale, or fire-clay: see s. 3, *ante*, p. 676) which the miner is employed to get: Brace *v.* Abercarn Colliery Co.; Huggins *v.* London, &c., Co., 1891, 1 Q. B. 496, 2 Q. B. 699. It follows that the section does not authorise a deduction in respect of small coal where the mineral contracted to be gotten is coal: *ib.* See, further, Netherseal Colliery Co. *v.* Bourne, 14 A. C. 228, *per* Lords Halsbury, Herschell, and Macnaghten, Lords Bramwell and Fitzgerald dissenting; affirming S. C. 20 Q. B. D. 606, *per* Lord Esher and Lopes, L. J., Fry, L. J., dissenting; which overruled on this point S. C. 19 *ib.* 357. This case was decided on s. 17 of the Act of 1872, and overruled Hynd *v.* Spowart & Co., 22 S. L. R. 702, and Jones *v.* Llynvi Colliery Co., cited 19 Q. B. D. 360

[6] This deduction meets the case of an undue proportion of slack or dust being sent up in the tub. It is a deduction for improper filling. and it is accordingly immaterial whether the slack or dust is coal or not. The deduction is arrived at by taking the total weight of the substances sent up in the tub and deducting the materials, whether slack, dust, or otherwise, improperly put in: see Netherseal Colliery Co. *v.* Bourne, 14 A. C. at p. 246, *per* Lord Macnaghten; Kearney *v.* Whitehaven Colliery Co., 1893, 1 Q. B. at pp. 708, 709, *per* Lord Esher.

[7] The special mode agreed upon must not contravene the requirement of this section that deductions can only be made from weight. In Kearney *v.* Whitehaven Colliery Co. (1893, 1 Q. B. 700) an agreement was entered into between the company and the men by which about one tub out of every twenty was tested. If that tub was found to contain more than a specified quantity of dirt, no payment was made in respect of the coal in it. Wages were paid in respect of the other tubs in full. It was held that the agreement was void. An agreement for a uniform average deduction from the weight of the gross contents of each tub sent up, is, however, valid: Kearney *v.* Whitehaven Colliery Co., *sup.* p. 714, *per* Smith, L. J.; Ronaldson *v.* Mowat, 21 R. Just. Cas. 55. An agreement that no payment shall be made for the excess weight in any tub beyond a certain limit is also valid; on the ground that overfilling is a form of improper filling: Atkinson *v.* Hastie, 21 R. Just. Cas. 62. The corresponding section of the Act of 1872 (s. 17) made no provision for a special agreement, but required the deductions to be determined by the banksman or weigher, and check weigher (if there was one), and it was held under that section in Bourne *v.* Netherseal Colliery Co., 19 Q. B. D. 357 (see also S. C. 20 Q. B. D. 606; Netherseal Colliery Co. *v.* Bourne, 14 A. C. 228), that the practice of ascertaining the deductions by means of a boy who noted down the figures shown on the dial of the weighing machine was illegal, because they were not determined by the banksman or weigher, and check weigher.

[8] The Act of 1911 applies to offences under the unrepealed provisions of the Coal Mines Regulation Acts, 1887 to 1908, in like manner as if they were offences against the Act of 1911; see s. 126 (e), *ante*, p. 664.

The check weigher is not entitled to act as a member of the Court of Summary Jurisdiction in which proceedings are taken (see s. 103 (2) of the Act of 1911, *ante*, p. 656).

[9] Cf. s. 75 of the Act of 1911 and notes thereto, *ante*, p. 52; and as to the liability of owners and agent, see s. 2, n. 1, and s. 102 of that Act, *ante*, pp. 585, 654.

[10] See *post*, s. 13 (7). Under the corresponding provision (s. 17) of the Act of 1872, the power of exemption was not limited to a mine employing not more than thirty persons underground. Orders of exemption under that section in respect of mines employing more than thirty persons underground remain in force by virtue of s. 79 of this Act, and s. 126 (a) of the Act of 1911, *ante*, p. 663): see Dickinson *v.* Handsley, 60 L. T., N. S. 567. The provisions of s. 12 are not affected by the Truck Act, 1896: see s. 8 of the latter Act.

Appointment on part of men, and removal, of check weigher.

13. (1.) The persons who are employed in a mine,[1] and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as "a check weigher" [2]) at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be.

(2.) A check weigher shall have every facility afforded to him for enabling him to fulfil the duties for which he is stationed, including facilities for examining and testing the weighing machine, and checking the tareing of tubs and trams where necessary; and if at any mine proper facilities are not afforded to a check weigher as required by this section, the owner agent and manager of the mine shall each be guilty of an offence against this Act,[3] unless he proves that he had taken all reasonable means [4] to enforce to the best of his power the requirements of this section.[5]

(3.) A check weigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine; [6] but shall be authorised only to take such account or determine such deductions as aforesaid, and the absence of a check weigher from the place at which he is stationed shall not be a reason for interrupting or delaying the weighing or the determination of deductions at such place respectively, but the same shall be done or made by the person appointed in that behalf by the owner agent or manager, unless the absent check weigher had reasonable ground to suppose that the weighing or the determination of the deductions, as the case may be, would not be proceeded with: Provided always, that nothing in this section shall prevent a check weigher giving

to any workman an account of the mineral gotten by him, or information with respect to the weighing, or the weighing machine, or the tareing of the tubs or trams, or with respect to the deductions or any other matter within the scope of his duties as check weigher, so always, nevertheless, that the working of the mine be not interrupted or impeded.

(4.) If the owner agent or manager of the mine desires the removal of a check weigher on the ground that the check weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or with any of the workmen, or with the management of the mine,[6] or has at the mine to the detriment of the owner agent or manager, done anything beyond taking such account determining such deductions or giving such information as aforesaid, he may complain to a court of summary jurisdiction,[7] who, if of opinion that the owner agent or manager shows sufficient *primâ facie* ground for the removal of the check weigher, shall call on the check weigher to show cause against his removal.

(5.) On the hearing of the case the court shall hear the parties, and, if they think that at the hearing sufficient ground is shown by the owner, agent, or manager to justify the removal of the check weigher, shall make a summary order for his removal, and the check weigher shall thereupon be removed, but without prejudice to the stationing of another check weigher in his place.[8]

(6.) The court may in every case make such order as to the costs of the proceedings as the court may think just.

(7.) If in pursuance of any order of exemption[9] made by a Secretary of State, the persons employed in a mine are paid by the measure or gauge of the material gotten by them, the provisions of this Act shall apply in like manner as if the term "weighing" included measuring and gauging, and the terms relating to weighing shall be construed accordingly.

(8.) If the person appointed by the owner agent or manager to weigh the mineral impedes or interrupts the check weigher in the proper discharge of his duties, or improperly interferes with or alters the weighing machine or the tare in order to prevent a correct account being taken of the weighing and tareing, he shall be guilty of an offence against this Act.[10]

[1] In a mine not divided into parts under s. 19 of this Act, which is substantially re-enacted by s. 25 of the Act of 1911 (*ante*, p. 604), there were two seams of coal worked as one mine by separate gangs of miners paid according to the weight of mineral gotten by them. It was held that the two seams together constituted a mine; and consequently that the miners working in one of the seams could not under the present provision appoint a check weigher in respect of the mineral gotten from that seam: Thorpe *v.* Davies, 1908, 2 K. B. 750.

[2] Under the Act of 1872 (s. 18) the check weigher was required to be one

of the persons employed in the mine, or in another mine belonging to the same owner. It was accordingly held, that the reappointment of a check weigher, who had received from the men a fortnight's notice to quit, within the fortnight, was invalid; on the ground, that, when appointed check weigher, he ceased to be employed by the mine owner, and was not therefore in such employment at the date of the re-election: Hopkinson *v.* Caunt, 14 Q. B. D. 592. The present section contains no restriction as to the persons who may be appointed check weighers.

[3] See s. 12, n. 8, *supra*.

[4] Cf. s. 2, n. 1, and s. 75, n. 3 of the Act of 1911, *ante*, pp. 585, 635.

[5] See also Coal Mines (Check Weigher) Act, 1894, s. 1, *post*, p. 683.

[6] Giving information to the men on which he knew that they would act, and without which they would have gone to work, is an interference by a check weigher with the management: *Ex parte* White, 13 T. L. R. 580. Interference is not limited to acts done by a check weigher by virtue of or in connection with his office, or to acts done at the mine: Sykes *v.* Barraclough, 1904, 2 K. B. 675.

[7] S. 61 (2) of this Act provided that "proceedings for the removal of a check weigher shall be deemed to be a matter on which a court of summary jurisdiction has authority by law to make an order in pursuance of the Summary Jurisdiction Acts; and summary orders under this Act may be made on complaint before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts." This section is repealed by the Act of 1911; see s. 126, and Sched. IV., *ante*, pp. 663, 675; s. 61 (2) is not in terms re-enacted by the Act of 1911 (cf. s. 103, *ante*, p. 655). But s. 61 (2) was in any case unnecessary, having regard to the provisions of s. 13 (4). As to the meaning of "Court of Summary Jurisdiction," see s. 13 of the Interpretation Act, 1889.

[8] An order under this sub-section may be obtained where the check weigher is intimidating workmen to induce them to cease working: Prentice *v.* Hall, 26 W. R. 237, decided under the Act of 1872. Actual interruption of the working is not necessary: *ib.* See the observations on Prentice *v.* Hall in Sykes *v.* Barraclough, *sup.* The check weigher ceases to hold office when the miners are dismissed and the mine closed, and he is not reinstated, even if the same miners are immediately re-engaged: Whitehead *v.* Holdsworth, 4 Ex. D. 13, decided under the Act of 1872; Merryton Coal Co. *v.* Anderson, 18 R. 203. An order removing a check weigher is not bad merely because it provides that he shall "henceforth" cease to perform the duties of check weigher in the mine in question (R. *v.* Llewellyn, 96 L. T. 32).

[9] See s. 12 (3), *ante*, p. 677.

[10] See further n. 3 to s. 14, *infra*.

Remuneration of check weigher.

14. (1.) Where a check weigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid,[1] his proportion of the check weigher's wages or recompense, notwithstanding that any of the persons by whom the check weigher was appointed may have left the mine, or others have entered the same since the check weigher's appointment, any rule of law or equity to the contrary notwithstanding.

(2.) It shall be lawful for the owner or manager of any mine, where

the majority of the before-mentioned persons, ascertained as aforesaid, so agree, to retain the agreed contribution of the persons so employed and paid as aforesaid for the check weigher, notwithstanding the provisions of the Acts relating to truck,[2] and to pay and account for the same to the check weigher.[3]

[1] The check weigher cannot recover under this section unless the person employed is actually paid by weight. It is not sufficient that the weighing should benefit him indirectly, as by entitling a person paid by the day to enter into a more advantageous contract of service when the amount of mineral worked by him exceeds a specified quantity: Oxton *v.* Williams, 101 L. T. 957. But if a miner, who had been previously paid by weight, ceased to be so paid, and failed to inform the check weigher of the fact, and the check weigher continued to weigh coal worked by the miner, the former might be able to claim upon a quantum meruit (*Ib.*, *per* Phillimore, J.).

[2] The Truck Act, 1831, 1 & 2 Will. 4, c. 37, and The Truck Amendment Act, 1887, 50 & 51 Vict. c. 46.

[3] As to a deputy check weigher; evidence as to the appointment of a check weigher, or deputy; provision for a shelter; restrictions upon the removal of a person appointed; further provisions as to the persons who are to appoint and pay; and notices of meetings to appoint; see Coal Mines (Weighing of Minerals) Act, 1905, *post*, p. 684.

Application of 41 & 42 Vict. c. 49 to weights, &c., used in mines.

15. (1.) The Weights and Measures Act, 1878, shall apply to all weights, balances, scales, steelyards, and weighing machines used at any mine for determining the wages payable to any person employed in the mine according to the weight of the mineral gotten by him, in like manner as it applies to weights, balances, scales, steelyards, and weighing machines used for trade.

(2.) An inspector of weights and measures appointed under the said Act shall once at least in every six months inspect and examine in manner directed by the said Act the weights, balances, scales, steelyards, and weighing machines used or in the possession of any person for use as aforesaid at any mine within his district; and shall also make such inspection and examination at any other time in any case where he has reasonable cause to believe that there is in use at the mine any false or unjust weight, balance, scale, steelyard, or weighing machine.

(3.) The inspector shall also inspect and examine the measures and gauges in use at the mines within his district; but nothing in this section shall prevent or interfere with the use of the measures or gauges ordinarily used at the mine.

(4.) An inspector may, for the purposes of this section, without any authorisation from a justice of the peace, exercise at or in any mine, as respects all weights, measures, scales, balances, steelyards, and weighing machines used or in the possession of any person for use at or in that mine, all such powers as he could exercise, if authorised in writing by a justice of the peace, under section forty-

eight of the Weights and Measures Act, 1878, with respect to any such weights, measures, scales, balances, steelyards, and weighing machines, as therein mentioned; and all the provisions of that section, including the liability to penalties, shall apply to such inspection.

(5.) The inspector of weights and measures shall not, in fulfilling the duties required of him under this section, impede or obstruct the working of the mine.

THE COAL MINES (CHECK WEIGHER) ACT, 1894.

(57 & 58 *Vict. c.* 52.)

An Act to amend the provisions of the Coal Mines Regulation Act, 1887, with respect to Check Weighers.

[25th August, 1894.]

Penalty for interference with office of check weigher.

1. If the owner, agent, or manager of any mine, or any person employed by or acting under the instructions of any such owner, agent, or manager, interferes with the appointment of a check weigher, or refuses to afford proper facilities for the holding of any meeting for the purpose of making such appointment, in any case in which the persons entitled to make the appointment do not possess or are unable to obtain a suitable meeting place, or attempts, whether by threats, bribes, promises, notice of dismissal, or otherwise howsoever, to exercise improper influence in respect of such appointment, or to induce the persons entitled to appoint a check weigher, or any of them, not to reappoint a check weigher, or to vote for or against any particular person or class of persons in the appointment of a check weigher, such owner, agent, or manager shall be guilty of an offence against the Coal Mines Regulation Act, 1887.[1]

50 & 51 Vict. c. 58.

[1] See Coal Mines Regulation Act, 1887, s. 13, *ante*, p. 679; and see also s. 12, n. 1, *ante*, p. 679.

Short title.

2. This Act may be cited as the Coal Mines (Check Weigher) Act, 1894.

COAL MINES (WEIGHING OF MINERALS) ACT, 1905.

(5 *Ed.* 7. *c.* 9.)

An Act to amend the provisions of the Coal Mines Regulation Act, 1887, which relate to the Weighing of Minerals.

[4th August, 1905.]

Amendments of 50 & 51 Vict. c. 58, s. 13, as to check weighers.

1. (1.) The power conferred by the principal Act on the persons employed in a mine, and paid according to the weight of the mineral gotten by them, to appoint a check weigher,[1] shall include power to appoint a deputy to act in the absence of the check weigher for reasonable cause, and the expression "check weigher" when used in the principal Act and in this Act shall include any such deputy check weigher during such absence as aforesaid.

(2.) A statutory declaration, made by the person who presided at a meeting for the purpose of appointing a check weigher or deputy check weigher, to the effect that he presided at that meeting, and that the person named in the declaration was duly appointed check weigher or deputy check weigher, as the case may be, by that meeting, shall be forthwith delivered to the owner, agent, or manager of the mine, and shall be *primâ facie* evidence of that appointment.

(3.) Where the check weigher or deputy check weigher was appointed by a majority ascertained by ballot of the persons employed in the mine, and paid according to the mineral gotten, the declaration shall so state, and if he was not so appointed, then it shall state the names of the persons by whom or on whose behalf the check weigher or deputy check weigher was appointed. Where a check weigher or deputy check weigher is appointed by such a majority as aforesaid, he shall be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him.

(4.) The facilities to be afforded to a check weigher under section thirteen of the principal Act[2] shall include provision for a check weigher of a shelter from the weather, containing the number of cubic feet requisite for two persons, a desk or table at which the check weigher may write, and a sufficient number of weights to test the weighing machine.

(5.) When a check weigher or deputy check weigher is appointed by a majority ascertained by ballot of the persons employed in the mine, and paid according to the mineral gotten, he shall not be

removed by the persons employed in the mine except by a majority ascertained by ballot of the persons employed and paid as aforesaid at the time of the removal.

[1] S. 13, *ante*, p. 679.
[2] *Ante*, p. 679.

Amendments as to persons who appoint and pay check weighers.

2. (1.) For the purposes of the principal Act and of this Act the persons who are entitled under section thirteen of the principal Act to appoint a check weigher,[1] and from whom he is entitled under section fourteen of the principal Act to recover his wages or recompense,[2] shall be deemed to include not only the persons in charge of the working places, but also all holers, fillers, trammers, and other persons who are paid according to the weight of the mineral gotten.

(2.) Where there are persons employed in a mine who are employed by a contractor who is himself paid according to weight of mineral gotten, such persons, if they are either in charge of the working places or are holers, fillers, trammers, or brushers, shall, notwithstanding that they are paid by the contractor and otherwise than in accordance with the weight of mineral gotten, be deemed to be included among those who are entitled to appoint a check weigher, and from whom he is entitled as aforesaid to recover wages or recompense, but the proportion of such wages or recompense recoverable in respect of such persons shall be paid by the contractor who employs them, and recoverable by the check weigher from him alone.

(3.) The wages or recompense which a check weigher may recover under section fourteen of the principal Act [2] shall include expenses properly incurred by him in carrying out his work under the principal Act.

[1] *Ante*, p. 679.
[2] *Ante*, pp. 681, 682.

Notice of intention to appoint check weigher.

3. All persons who are entitled by the principal Act or this Act to appoint a check weigher or deputy check weigher shall have due notice given to them of the intention to appoint a check weigher or deputy check weigher, by a notice posted at the pithead or otherwise specifying the time and place of the meeting, and have the same facilities given to each of them for the purpose of recording their votes either by ballot or otherwise in such appointment.

Construction and short title.

4. (1.) This Act shall be construed as one with the principal Act.

(2.) This Act may be cited as the Coal Mines (Weighing of Minerals) Act, 1905, and the Coal Mines Regulation Acts, 1887 to 1896, and the Coal Mines Regulation Act (1887) Amendment Act, 1903, and this Act may be cited collectively as the Coal Mines Regulation Acts, 1887 to 1905.

c.—THE COAL MINES REGULATION ACT, 1908.

(8 *Edw.* 7. *c.* 57.)

An Act to amend the Coal Mines Regulation Acts, 1887 to 1905, for the purpose of limiting hours of work below ground. [21st December, 1908.]

Limit of hours of work below ground in coal mines.

1. (1.) Subject to the provisions of this Act a workman [1] shall not be below ground in a mine [2] for the purpose of his work, and of going to and from his work, for more than eight hours during any consecutive twenty-four hours.

(2.) No contravention of the foregoing provisions shall be deemed to take place in the case of a workman working in a shift [3] if the period between the times at which the last workman in the shift leaves the surface and the first workman in the shift returns to the surface does not exceed eight hours; nor shall any contravention of the foregoing provisions be deemed to take place in the case of any workman who is below ground for the purpose of rendering assistance in the event of accident, or for meeting any danger or apprehended danger, or for dealing with any emergency or work uncompleted through unforeseen circumstances which requires to be dealt with without interruption in order to avoid serious interference with ordinary work in the mine or in any district of the mine, or, in the case of stallmen when engaged in the process of taking down top coal in square or wide work in the thick coal of the South Staffordshire district, so long as their presence in or near the stall is necessary to ensure safety.[4]

(3.) The owner, agent,[5] or manager of every mine shall fix for each shift [6] of workmen in the mine the time at which the lowering [7] of the men to the mine is to commence and to be completed, and the time at which the raising of the men from the mine is to commence and to be completed, in such a manner that every workman shall have the opportunity of returning to the surface without contravention of the foregoing provisions of this section, and shall post and keep posted at the pit head a conspicuous notice of the times so fixed, and shall make all arrangements necessary for the observance of those times in lowering and raising the men.

(4.) The interval between the times fixed for the commencement and for the completion of the lowering and raising of each shift of workmen to and from the mine shall be such time as may for the time being be approved by the inspector as the time reasonably required for the purpose. Provided that, in the event of any accident to the winding machinery, or other accident interfering with the lowering or raising of workmen, the interval may temporarily be extended to such extent as may be necessary; but in any such case the owner, agent, or manager of the mine shall on the same day send notice of the extension and the cause [8] thereof to the inspector, and the extension shall not continue beyond such date as may be allowed by the inspector.

(5.) In the event of the owner, agent, or manager feeling aggrieved by a decision of the inspector under the last foregoing sub-section, the matter shall, in accordance with regulations [9] as to procedure and costs made by the Secretary of State, be referred to the decision of a person appointed by the judge of county courts for the district, or in Scotland by the sheriff of the county, in which the mine is situate, whose decision shall be final; but until such decision is given the times approved by the inspector shall be in force as respects the mine.

(6.) A repairing shift of workmen may, notwithstanding the provisions of this section, for the purpose of avoiding work on Sunday, commence their period of work on Saturday before twenty-four hours have elapsed since the commencement of their last period of work, so long as at least eight hours have elapsed since the termination thereof.[10]

(7.) For the purposes of this Act, the expression "workman" means any person employed in a mine below ground,[11] who is not an official [12] of the mine (other than a fireman, examiner, or deputy), or a mechanic [12] or horse-keeper, or a person engaged solely in surveying or measuring; and any number of workmen whose hours for beginning and terminating work in the mine are approximately the same shall be deemed to be a shift of workmen:

Provided that—

(*a*) In the case of a fireman, examiner, or deputy, onsetter, pump-minder, fanman, or furnace-man, the maximum period for which he may be below ground under this Act shall be nine hours and a half; and

(*b*) Where the work of sinking a pit or driving a cross-measure drift is being carried on continuously, no contravention of the provisions of this Act shall be deemed to take place as respects any workman engaged on that work if the number of hours spent by him at his working place does not exceed

six at any one time, and the interval between the time of leaving the working place and returning thereto is in no case less than twelve hours.

If any question under this section arises (otherwise than in legal proceedings) whether any person is a workman or is a workman of any particular class, that question shall be referred to the Secretary of State, and his decision shall be final.

[1] Workman is defined by sub-s. 7.

[2] This Act applies to all mines to which the Coal Mines Regulation Acts, 1887 to 1905, apply, and is to be construed as one with those acts; see s. 8, *post*, p. 691. The greater part of those Acts has now been repealed and re-enacted by the Coal Mines Act, 1911, which enacts, s. 126 (e), *ante*, p. 664, that expressions in the present Act shall have the same meaning as in the Act of 1911. "Mine" s defined by s. 122 of that Act, *ante*, p. 661.

[3] Shift is defined by sub-s. 7.

[4] The exemptions from liability contained in the latter part of sub-s. 2 apply to all workmen who are subject to the Act, whether working in a shift or independently. On every occasion where a workman is below ground for more than the time fixed by the Act, a record of the fact and the cause must be entered on the register directed to be kept by s. 2 (1), *infra*. And if proceedings are taken against a workman the onus of justifying his presence below ground beyond the statutory limit is on him; see s. 7 (3), *post*, p. 691.

[5] Owner and agent are defined by s. 122 of the Act of 1911, *ante*, pp. 660, 661, and see s. 126 (e), *ante*, p. 664.

[6] It will be observed that sub-s. 3, 4 and 5 only apply to shifts of workmen; but where a mine is not worked in shifts a corresponding obligation is imposed upon the owner, agent, and manager by s. 6, *post*, p. 690, which requires them to make regulations for securing compliance with the provisions of the Act, and to provide the means of raising men within the statutory period.

[7] As to the application of the Act to mines not entered by a shaft, see s. 5, *post*, p. 690.

[8] The extension and cause must also be entered on the register; see s. 2 (1) *infra*.

[9] The regulations now in force are given, *post*, pp. 691, 692.

[10] This sub-section does not extend to an individual engaged in repairing work.

[11] The hours of employment of enginemen employed in winding persons are limited to 8 hours by s. 57 of the Act of 1911, *ante*, p. 627.

[12] "Official" and "Mechanic" are not defined by this Act or by the Act of 1911.

Register of times of descent and ascent.

2. (1.) The owner, agent, or manager of every mine shall appoint one or more persons[1] to direct at the pit head the lowering and raising of men to and from the mine, and shall cause a register to be kept in the form prescribed by the Secretary of State, and containing the particulars prescribed by him with respect to the times at which men are lowered into and raised from the mine, and the cases in which any man is below ground for more than the time fixed by this Act, and the cause thereof, and the register shall be open to inspection by the inspector.

(2.) The workmen in a mine may, at their own cost, appoint and station one or more persons, whether holding the office of check weigher or not, to be at the pit head, at all times when workmen are to be lowered or raised, for the purpose of observing the times of lowering and raising, and the provisions of the Coal Mines Regulation Acts, 1887 to 1905, relating to the check weigher, and to the relations between the owner, agent, or manager of the mine and the check weigher shall, so far as applicable apply to any person so appointed as they apply to the check weigher, with the substitution, as respects appointment, of the workmen in the mine for the persons who under those Acts are entitled to appoint a check weigher.[2]

(3.) If any person knowingly makes a false entry in the register which is to be kept under this section, or knowingly causes or permits any such false entry to be made, he shall be liable on summary conviction in respect of each offence to a fine not exceeding five pounds. Provided that the total amount of fines for offences under this section committed by any one person at any one pit head in any one period of twenty-four hours shall not exceed twenty-five pounds.

[1] The persons appointed for this purpose may also be employed in other work (cf. s. 14 (2) of the Act of 1911, *ante*, p. 597).

[2] The provisions as to check weighers are contained in ss. 13 and 14 of the Act of 1887, *ante*, pp. 679–682; The Coal Mines (Check Weigher) Act, 1894, *ante*, p. 683; and The Coal Mines (Weighing of Minerals) Act, 1905, *ante*, pp. 684, 685. The absence of the person appointed under this sub-section need not delay the winding (see s. 13 (3) of the Act of 1887). And he is only entitled to be present for the purpose of making observations. If he interfered with the workmen or the management he might be removed (see s. 13 (4) of the Act of 1887).

Power to extend hours of work on a limited number of days in a year.

3. (1.) The time fixed by this Act as the time during which the workmen in a mine may be below ground for the purpose of their work and of going to and from their work may be extended as respects any mine by the owner, agent, or manager of the mine, on not more than sixty days in any calendar year by not more than one hour a day, and on any day on which an extension of time is made in accordance with this section as respects any mine the time as so extended shall be substituted for the purposes of this Act as respects that mine for the time as fixed by this Act.[1]

(2.) The owner, agent, or manager of every mine shall cause a register to be kept in such manner as the Secretary of State may direct of the cases in which any extension of time has been given under this section, and the register shall be open to inspection by the inspector.[2]

[1] An agreement of service, providing that the hours of labour underground "shall be such as are authorised by the Coal Mines Regulation Act, 1908,"

imposes upon the workman an obligation to work any extra hours properly extended under this section: Robinson *v.* Insoles, 102 L. T. 45.

[2] The form is given *post*, pp. 693, 694.

Power to suspend Act by Order in Council in event of emergency.

4. His Majesty may, in the event of war or of imminent national danger or great emergency, or in the event of any grave economic disturbance due to the demand for coal exceeding the supply available at the time, by Order in Council suspend the operation of this Act to such extent and for such period as may be named in the Order, either as respects all coal mines or any class of coal mines.

Application to mines not entered by a shaft, &c.

5. In the application of this Act to mines which are entered otherwise than by a shaft, and to workmen who are not lowered to or raised from the mine by means of machinery, the admission of men to the mine shall be substituted for the lowering of men to the mine, and the return of men from the mine shall be substituted for the raising of men from the mine, and such times as may be determined by the owner, agent, or manager of the mine, with the approval of the inspector, as the times properly corresponding to the times fixed for the commencement and completion of the lowering and raising of workmen to and from the mine, shall be substituted for the times so fixed.

Provisions for securing compliance with Act.

6. For securing compliance with the provisions of this Act, it shall be the duty of the owner, agent, or manager of every mine—

(*a*) to make regulations for that purpose and publish such regulations by posting them and keeping them posted at the pit head, and by supplying a copy thereof gratis to every workman employed underground in the mine who, not having been previously supplied with a copy, applies therefor at the office at which he is paid; and

(*b*) to provide necessary means for raising the men from the mine within the time limited by this Act.[1]

[1] See s. 1, n. 6, *ante*, p. 688.

Penalties.

7. (1.) If any person contravenes or fails to comply with any provision of this Act or connives at any such contravention or failure on the part of any other person, he shall be guilty of an offence against this Act.

Provided that a workman shall not be guilty of an offence under this Act in the case of any failure to return to the surface within the time limited by this Act if he proves that without default on his part he was prevented from returning to the surface owing to means not being available for the purpose.

(2.) A person guilty of an offence under this Act for which a

special penalty is not provided shall, in respect of each offence, be liable, on summary conviction, if he is the owner, agent, or manager of the mine, to a fine not exceeding two pounds, and in any other case to a fine not exceeding ten shillings.[1]

(3.) If a workman is below ground for a longer period during any consecutive twenty-four hours than the time fixed by this Act he shall be deemed to have been below ground in contravention of this Act unless the contrary is proved.

[1] S. 104 of the Act of 1911, which resembles s. 63 of the Act of 1887 (*ante*, p. 73), provides for an appeal in Quarter Sessions, where a fine is imposed equal to or exceeding half the maximum penalty.

Application, commencement, and short title.

8. (1.) This Act shall, except where the contrary intention appears, apply to all mines to which the Coal Mines Regulation Acts, 1887 to 1905, apply.

(2.) This Act shall come into operation, as respects mines in the counties of Northumberland and Durham, on the first day of January, nineteen hundred and ten, and elsewhere on the first day of July, nineteen hundred and nine.

(3.) This Act may be cited as the Coal Mines Regulation Act, 1908, and shall be construed as one with the Coal Mines Regulation Acts, 1887 to 1905, and this Act and those Acts may be cited together as the Coal Mines Regulation Acts, 1887 to 1908.

Regulations, dated May 15, 1909, made by the Secretary of State under section 1 (5) of the Coal Mines Regulation Act, 1908 (8 Edw. 7. c. 57).

1. The inspector shall send to the owner agent or manager a statement in the prescribed form of the times approved by him under section 1 (4), and in the event of the owner agent or manager feeling aggrieved by the decision of the inspector and desiring the matter to be referred to the decision of a person appointed by the Judge of County Courts or in Scotland by the Sheriff of the County in pursuance of section 1 (5), he shall give notice in writing of his objection to the inspector within one week of the receipt of the inspector's statement, setting out in the notice the specific grounds of objection and the modifications asked for.

2. On receipt of a notice of objection, the inspector shall make application in writing to the Judge of County Courts for the district or in Scotland to the Sheriff of the County to appoint a referee, and shall forward to him copies of his statement and of the notice of objection.

3. The referee when appointed by the Judge or Sheriff shall at once

serve notice by post on the inspector and on the owner agent or manager of his appointment and of the time and place fixed by him for the hearing of the objection.

4. The time fixed by the referee for the hearing shall not be less than three days and not more than fourteen from the time of his appointment, and the place shall be at the mine, unless the inspector and the owner agent or manager otherwise agree.

5. The inspector may appear at the hearing personally or by an assistant inspector. The owner agent or manager may appear personally or by an official of the mine. Neither party shall appear by solicitor or counsel.

A majority of the workmen employed underground at the mine may appoint any person, not being a solicitor or counsel, to represent them at the hearing, and any person so appointed may take part in the proceedings at the hearing in such manner as the referee may direct.

6. The referee may examine the parties and any persons employed at the mine or tendered by the parties as witnesses, and may make such inspection of the mine as he may deem necessary.

7. The referee shall communicate his decision in writing to both parties as soon as possible after the hearing.

8. The remuneration of the referee shall if the hearing takes place at the mine be a sum of five guineas together with any expenses necessarily incurred for travelling; if the hearing takes place elsewhere, a sum of three guineas; provided that in any case of exceptional difficulty a special fee may be paid on the recommendation of the Secretary of State approved by the Treasury. The remuneration of the referee shall be payable in equal portions by the parties unless the referee otherwise direct on the ground that the objection was unreasonable, or on other special grounds to be stated by him in writing.

EXTENSION OF TIME.—The time below ground on this day is extended by one hour in pursuance of section 3.

Date. 19 . *Signature of Owner, Agent or Manager*

SHIFTS.

1. Name or description of shift, and number going into the mine. N.B.—*Firemen, examiners or deputies; onsetters, pump-minders, fanmen or furnace-men must not be entered with a shift of other workmen. If forming a shift of themselves, they will be entered in this column as a separate shift. Otherwise they will be entered on the opposite page.*		2. Time of Lowering or Admission.		3. Entry in preceding column certified correct. (*Person certifying to sign in this column.*)	4. Time of Raising or Return.		5. Entry in preceding column certified correct. (*Person certifying to sign in this column.*)	6. Where any shift or any member of a shift is below ground for more than the time fixed by this Act, full particulars of the cause must be stated in this column, and if it is claimed that the case falls within any exception allowed by the Act (sec. 1 (2), sec. 1 (4), sec. 1 (7) (*b*)) this should be stated.	7. Entry in preceding column certified correct. (*Person certifying to sign in this column.*)
Name or description.	Number going in.	Commencement.	Completion.		Commencement.	Completion.			

Date. 19

PERSONS NOT FORMING A SHIFT.

1.	2.	3.	4.	5.	6.	7.
Names of persons not forming a shift. N.B.—*In the case of Firemen, examiners or deputies, onsetters, pump-minders, fanmen and furnacemen, their occupation must also be stated.*	Time of Lowering or Admission.	Entry in preceding column certified correct. (*Person certifying to sign in this column.*)	Time of Raising or Return.	Entry in preceding column certified correct. (*Person certifying to sign in this column.*)	Where any person is below ground for more than the time fixed by this Act full particulars of the cause must be stated in this column, and if it is claimed that the case falls within any exceptions allowed by the Act (sec. 1 (2), sec. 1 (4), sec. 1 (7) (*b*)) this should be stated.	Entry in preceding column certified correct. (*Person certifying to sign in this column.*)

SECT. 2.—METALLIFEROUS MINES, &c.

a.—THE METALLIFEROUS MINES REGULATION ACT, 1872.

(35 & 36 *Vict. c.* 77.)

An Act to consolidate and amend the Law relating to Metalliferous Mines.[1] [10th August, 1872.]

[1] The preamble, &c., is repealed: see Stat. Law Rev. (No. 2) Act, 1893.

Preliminary.

1. This Act may be cited as "The Metalliferous Mines Regulation Act, 1872." [1] Short title.

[1] This Act is to be construed as one with the Metalliferous Mines Regulation Act, 1875; and the two Acts may be cited together as the Metalliferous Mines Regulation Acts, 1872 and 1875; see s. 3 of the Act of 1875.

2. [Repealed Stat. Law Rev. (No. 2) Act, 1893.]

3. This Act shall apply to every mine of whatever description other than a mine to which the Coal Mines Regulation Act, 1872,[1] applies.[2] Application of Act.

[1] Now the Coal Mines Act, 1911: see s. 83 of the Coal Mines Regulation Act, 1887, and s. 126 (d) of the Coal Mines Act, 1911, *ante*, p. 664.

[2] The Coal Mines Acts apply to mines of coal, stratified ironstone, shale, and fireclay: Coal Mines Act, 1911, s. 1, *ante*, p. 584. As to determining which Acts apply to a particular mine, see s. 39 of this Act, *post*, p. 723; and Coal Mines Act, 1911, s. 113, *ante*, p. 659. It has been doubted whether this Act applies to Crown mines subject to the Derbyshire custom: see Arkwright *v.* Evans, 49 L. J. M. C. 82, 87. But as duties were by s. 10 of the present Act, and are by s. 1 of the Met. Mines Act, 1875 (*post*, p. 698), imposed on barmasters, the doubt does not seem to be well founded. As to the Derbyshire custom, see pp. 557 *et seq.* of the 3rd edition of this book; and as to barmasters, see pp. 561 *et seq.* of same. A slate mine worked by means of underground workings by levels has been held to be a mine within this Act: Sim *v.* Evans, 23 W. R. 730.

As to the power of the Secretary of State to determine whether a mine comes within this Act, see s. 39, *post*, p. 723.

PART 1.

Employment of Women, Young Persons and Children.

4. No boy under the age of twelve [1] years, and no girl or woman of any age, shall be employed in or allowed to be for the purpose of employment in any mine to which this Act applies below ground. Employment of women and children in mines.

[1] Thirteen years since the passing of the Mines (Prohibition of Child Labour Underground) Act, 1900. As to the application of the Employment of Children Act, 1903, see s. 9 of that Act

Hours of employment of male young persons in mines.

5. A boy of the age of twelve years and under the age of thirteen years, and a male young person of the age of thirteen and under the age of sixteen years shall not be employed in or allowed to be for the purpose of employment in any mine [1] to which this Act applies below ground for more than fifty-four hours in any one week, or more than ten hours in any one day, or otherwise than in accordance with the regulations following; that is to say,

(1.) There shall be allowed an interval of not less than eight hours between the period of employment on Friday and the period of employment on the following Saturday, and in other cases of not less than twelve hours between each period of employment; provided always, that in the case of boys and young male persons whose employment is at such distance from their ordinary place of residence that they do not return there during the intervals of labour, and who are not employed during more than forty hours in any week, an interval of not less than eight hours shall be allowed between each period of employment:

(2.) The period of each employment shall be deemed to begin at the time of leaving the surface, and to end at the time of returning to the surface:

(3.) A week shall be deemed to begin at midnight on Saturday night, and to end at midnight on the succeeding Saturday night.

[1] The employment of women, young persons, and children in pit banks connected with metalliferous mines, to which this section does not apply, is regulated by the Fact. and Work. Act, 1901, and the Employment of Women Act, 1907; see note to s. 92 of the Coal Mines Act, 1911, *ante*, p. 648.

Register to be kept by owner, &c. of boys and male young persons employed in mines.

6. The owner or agent [1] of every mine to which this Act applies shall keep in the office at the mine, or in the principal office of the mine belonging to the same owner in the district in which the mine is situated, a register, and shall cause to be entered in such register the name, age, residence, and date of first employment of all boys of the age of twelve and under the age of thirteen years, and of all male young persons of the age of thirteen and under the age of sixteen years who are employed in the mine below ground, and of all women, young persons, and children employed above ground in connection with a mine, and shall produce such register to any inspector [2] under this Act at the mine at all reasonable times when required by him, and allow him to inspect and copy the same.

The immediate employer of every boy or male young person of the ages aforesaid, other than the owner or agent of the mine, before he causes such boy or male young person to be in any mine to which this Act applies below ground, shall report to the owner or agent of such

mine, or some person appointed by such owner or agent, that he is about to employ him in such mine.

[1] "Owner" and "agent" are defined by s. 41, *post*, p. 724. It will be observed that the duties of an agent under this Act correspond roughly with those of a manager under the Coal Mines Regulation Act, 1887, and the Coal Mines Act, 1911.

Like those Acts, this Act enforces upon owners statutory duties, some direct and absolute, others qualified. The principle of the cases decided under the Act of 1887 with relation to the civil and criminal liability of owners for breaches of statutory duties apply to the provisions of this Act. As to civil liability, see s. 2, n. 1, of the Act of 1911, *ante*, p. 585. Although the civil liability is not limited in the same express terms as the criminal liability, the cases in question establish the propositions enumerated in n. 1, on pp. 587, 588, including the proposition that the tests for determining civil and criminal liability are the same. As to criminal liability, see further s. 23 of this Act, *post*, pp. 712–716, s. 24, *post*, p. 716, s. 31, *post*, p. 719, and s. 35, *post*, p. 722; see also s. 75, n. 3, of the Act of 1911, *ante*, p. 635.

[2] See s. 15, *post*, p. 705.

As to employment of young persons under 18 in connection with engines.

7. Where there is a shaft, inclined plane, or level in any mine to which this Act applies, whether for the purpose of an entrance to such mine or of a communication from one part to another part of such mine, and persons are taken up, down, or along such shaft, plane, or level by means of any engine, windlass, or gin, driven or worked by steam or any mechanical power, or by an animal, or by manual labour, a person shall not be allowed to have charge of such engine, windlass, or gin, or of any part of the machinery, ropes, chains, or tackle connected therewith, unless he is a male of at least eighteen years of age.

Where the engine, windlass, or gin is worked by an animal, the person under whose direction the driver of the animal acts shall, for the purposes of this section, be deemed to be the person in charge of the engine, windlass, or gin, but such driver shall not be under twelve years of age.[1]

[1] This section appears to impose a qualified duty upon the owner: cf. s. 57 of the Coal Mines Act, 1911, and n. 1 thereon, *ante*, pp. 627, 628. His criminal liability is in terms limited by the next section.

Penalty for employment of persons contrary to this Act.

8. If any person contravenes or fails to comply with any provision of this Act with respect to the employment of women, girls, young persons, or boys, or to the register of or report respecting boys and male young persons, or to the employment of persons about any engine, windlass, or gin, he shall be guilty of an offence against this Act; and in case of any such contravention or non-compliance by any person whomsoever in the case of any mine, the owner and agent of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means [1] by publishing and to the best of his power enforcing the provisions of this Act to prevent such contravention or non-compliance.

If it appear that a boy or young person or a person employed about an engine, windlass or gin, was employed on the representation of his parent or guardian that he was of that age at which his employment would not be in contravention of this Act, and under the belief in good faith that he was of that age, the owner or agent of the mine and the immediate employer shall be exempted from any penalty, and the parent or guardian shall, for such misrepresentation, be deemed guilty of an offence against this Act.

[1] Cf. s. 2, n. 1 and s. 75, n. 3 of the Coal Mines Act, 1911, *ante*, pp. 585, 635.

Wages.

Prohibition of payment of wages at public houses, &c.

9. No wages shall be paid [1] to any person employed in or about any mine to which this Act applies at or within any public house, beer shop, or place for the sale of any spirits, wine, beer, cyder, or other spirituous or fermented liquor, or other house of entertainment, or any office, garden, or place belonging or contiguous thereto, or occupied therewith.

Every person who contravenes or fails to comply with, or permits any person to contravene or fail to comply with this section shall be guilty of an offence against this Act, and in the event of any such contravention or non-compliance in the case of any mine by any person whomsoever the owner and agent of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means [2] by publishing and to the best of his power enforcing the provisions of this section to prevent such contravention or non-compliance.

[1] For other provisions with regard to the payment of wages, see the Truck Acts, 1831, 1887, 1896, *post*, Chap. XXII.

[2] Cf. s. 75 of the Coal Mines Act, 1911, and n. 3 thereto, *ante*, p. 635.

Returns, Notices, and Abandonment.

10. [Repealed by section 4 of the Metalliferous Mines Act, 1875, itself repealed by the Stat. Law Rev. Act, 1883. The provisions as to returns are now contained in s. 1 of that Act and s. 1 of the Notice of Accidents Act, 1906.]

THE METALLIFEROUS MINES REGULATION ACT, 1875.[1]

(38 & 39 *Vict. c.* 39.)

[1] The preamble of the Act is repealed: see Stat. Law Rev. (No. 2) Act, 1893.

Returns by owners and agents of mines.

1. The owner or agent of every mine to which the Metalliferous Mines Regulation Act, 1872, applies shall, on or before the first day of February in every year, send to the inspector of the district on behalf of a Secretary of State a correct return, specifying, with respect to such mine, for the year ending on the preceding thirty-first day of December, the quantity in statute weight of the mineral

dressed, and of the undressed mineral which has been sold, treated, or used, during that year, and the number of persons ordinarily employed in or about such mine, below ground and above ground, distinguishing those who are employed below ground and above ground, and distinguishing the different classes and ages of the persons so employed whose hours of labour are regulated by the Metalliferous Mines Regulations Act, 1872.

The return shall be in such form as may be from time to time prescribed by a Secretary of State, and the inspector of the district on behalf of a Secretary of State shall from time to time, on application, furnish forms for the purpose of such return.

Every owner or agent of a mine who fails to comply with this section, or makes any return which is to his knowledge false in any particular, shall be guilty of an offence against the Metalliferous Mines Regulation Act, 1872.

Provided that—

(1.) In any mine where not more than twelve persons are employed underground, the returns specifying the quantity of mineral produced shall be made by the barmaster [1] or other local officer (if any) employed to collect the dues or royalty; and

(2.) Where there is such a barmaster [1] or other officer the owner or agent of such mine shall not be required to send any return specifying the number of persons employed in or about such mine.

[1] See p. 561 of the 3rd edition of this book.

NOTICE OF ACCIDENTS ACT, 1906.

(6 *Ed.* 7. *c.* 53.)

Annual returns of accidents in mines and quarries.

50 & 51 Vict. c. 58.
38 & 39 Vict. c. 39.

1. Section one of the Metalliferous Mines Regulation Act, 1875 (both in its application to metalliferous mines and in its application to quarries),[1] shall be read as if the matters to be specified in the returns to be given under that section included a statement containing such particulars as the Secretary of State may prescribe [2] of all accidents which occurred in or about the mine or quarry during the year to which the return relates, and disabled for more than seven days any person employed in or about the mine or quarry from working at his ordinary work.

[1] See the Quarries Act, 1894, *post*, p. 728.

[2] The form of return prescribed requires the following particulars: date and hour of accident; hour of shift; name and sex of person injured; age; ordinary occupation; place of accident; nature of injury; length of period of disablement; cause of accident.

Notices of accidents in mines and quarries.

2. (1.) "(*a.*) Where, in or about any mine to which this Act applies whether above or below ground, any accident occurs which either—

"(i.) causes loss of life to any person employed in or about the mine; or

"(ii.) causes any fracture of the head or of any limb, or any dislocation of a limb, or any other serious personal injury to any person employed in or about the mine; or

"(iii.) is caused by any explosion of gas or coal dust, or any explosive, or by electricity, or by over-winding, or by any other such special cause as the Secretary of State specifies by order, and causes any personal injury whatever to any person employed in or about the mine,

the owner, agent, or manager of the mine shall forthwith send notice in writing of the accident, and of any loss of life or personal injury caused thereby, to the inspector of the district, in such form and accompanied by such particulars as the Secretary of State prescribes." [1]

[1] The above section of the Notice of Accidents Act, 1906, is substituted for the first part of s. 11 of the Met. Mines Act. See also the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), and the Fatal Accidents Inquiry (Scotland) Act, 1895 (58 & 59 Vict. c. 36). The above section of the Act of 1906 applies equally to quarries, see s. 2 (2) of that Act and the Quarries Act, 1894, *post*, p. 728.

See further as to the liability of employers in case of accident, s. 6, n. 1, *ante*, p. 697, and *post*, pp. 712, 715, 716.

METALLIFEROUS MINES REGULATION ACT, 1872.

11. Where any personal injury, of which notice is required to be sent under this section, results in the death of the person injured, notice in writing of the death shall be sent to the inspector of the district on behalf of a Secretary of State within twenty-four hours after such death comes to the knowledge of the owner or agent.

Every owner or agent who fails to act in compliance with this section shall be guilty of an offence against this Act.

NOTICE OF ACCIDENTS ACT, 1906.

Application to railway sidings in connection with mines and quarries. 63 & 64 Vict. c. 27.

3. Where any line or siding, not being part of a railway within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900, is used in connection with a mine or quarry,[1] the provisions of the Metalliferous Mines Regulation Acts, 1872 and 1875, as

amended by this Act with respect to returns and notification of accidents shall have effect, so far as regards accidents to persons employed by or on behalf of the owner of the mine or quarry, as if the line or siding were part of the mine or quarry.

[1] See the Quarries Act, 1894, *post*, p. 728.

Power to extend provisions as to notice of accidents to dangerous occurrences.

5. (1.) If the Secretary of State considers that, by reason of the risk of serious injury to persons employed, it is expedient that notice should be given under this Act in every case of any special class of explosion, fire, collapse of buildings, accidents to machinery or plant, or other occurrences in a mine or quarry, . . . the Secretary of State may by order extend the provisions of this Act requiring notice of accidents to be given to an inspector to any such class of occurrences, whether personal injury or disablement is caused or not, and, where any such order is made, the provisions of this Act shall have effect as extended by the order.[1]

(2.) The Secretary of State may by any such order allow the required notice of any occurrence to which the order relates, instead of being sent forthwith, to be sent within the time limited by the order.

[1] An order was made under this section on 22nd December, 1906, by which the provisions of the Act were extended to the following classes of occurrences, whether personal injury or disablement is caused or not :—

(*a*) All cases of ignition of gas or dust below ground other than ignitions of gas in a safety lamp.
(*b*) All cases of fire below ground.
(*c*) All cases of breakage of ropes, chains, or other gear by which men are lowered or raised.
(*d*) All cases of overwinding cages, while men are being lowered or raised.
(*e*) All cases of inrush of water from old workings.

Repeal, construction and short title.

7. (2.) This Act may be cited as the Notice of Accidents Act, 1906, and shall come into operation on the first day of January, nineteen hundred and seven, but the Secretary of State may appoint a later date (not being later than the first day of January, one thousand nine hundred and eight) for any special provision of the Act to come into operation, and, if a later date is so appointed, that special provision shall not come into operation until that later date.

MINES ACCIDENTS (RESCUE AND AID) ACT, 1910.

(10 *Ed.* 7, *and* 1 *Geo.* 5, *c.* 15.)

Order by Secretary of State with respect to organisation for rescue and aid in

1. (1.) The Secretary of State may by order, made in accordance with this Act, of which notice shall be given in such manner as he may direct, require such provision as he may consider to be necessary to be made at all mines or any class of mines in regard to all or any of the following matters :—

the case of accidents in mines.

(*a*) Supply and maintenance of appliances for use in rescue work, and formation and training of rescue brigades :

(*b*) Supply and maintenance of ambulance appliances and the training of men in ambulance work.

(2.) The owner, agent, or manager of a mine shall, in the event of failure to comply with the provisions of any order made under this Act, be liable on summary conviction to a fine not exceeding twenty pounds, and to a further fine not exceeding one pound for every day during which the failure to comply continues after conviction thereof.

Procedure with respect to the making of an order under the Act.

2. (1.) Before the Secretary of State makes any order under this Act, he shall publish, in such manner as he may think best adapted for informing persons affected, notice of the proposal to make the order, and of the place where copies of the draft order may be obtained, and of the time (which shall not be less than thirty days) within which any objections made with respect to the draft order by or on behalf of persons affected must be sent to the Secretary of State.

(2.) Every objection must be in writing and state—

(*a*) the specific grounds of objection ;

(*b*) the omissions, additions, or modifications asked for.

(3.) The Secretary of State shall consider any objection made by or on behalf of any persons appearing to him to be affected which is sent to him within the required time, and he may, if he thinks fit, amend the draft order, and the foregoing provisions shall apply to the amended draft in like manner as they apply to the original draft.

(4.) If, after the publication of the notice with respect to any such draft order (whether an original or amended draft), any general objection as herein-after defined is made within the required time with respect to the draft and not withdrawn, the order shall not be made by the Secretary of State until that objection has been referred to a referee agreed upon between the Secretary of State and the objectors or, in default of agreement, appointed by the Lord Chief Justice of England.

If on any such reference the referee considers that the draft order should be varied to meet the objection, he shall recommend any variation which he considers necessary or expedient, and effect shall be given to those recommendations in the order, if made.

(5.) If the Secretary of State considers that any objection, though not a general objection, is of such a character that it is desirable to refer it to a referee, he may so refer it, and in that case the foregoing provisions shall apply as in the case of a general objection.

(6.) For the purposes of this section a "general objection" means an objection made either by or on behalf of owners of mines employing not less than one-third of the total number of men employed at the mines affected by the proposed order, or, if the order contains different provisions for different classes of mines, of the total number of men employed in any such class of mines, or by or on behalf of not less than one-third of the total number of men so employed.

The number of men employed shall be calculated in accordance with the returns for the last preceding year sent by owners of mines to the inspectors in pursuance of section one of the Metalliferous Mines Regulation Act, 1875.[1]

(7.) The Secretary of State may make regulations as to the procedure and costs on a reference under this section, and those regulations shall have effect accordingly.

(8.) An order under this Act may be revoked, altered, or added to by an order made in like manner and subject to the same provisions as the original order.

[1] *Ante*, p. 698.

Application and short title.

3. (1.) The expression "mine" means any mine to which the Metalliferous Mines Regulation Acts, 1872 and 1875, apply.

(2.) This Act may be cited as the Mines Accidents (Rescue and Aid) Act, 1910.

METALLIFEROUS MINES REGULATION ACT, 1872.

Notice of opening and abandonment of mine to be given to inspector.

12. In any of the following cases, namely,

(1.) Where any working is commenced for the purpose of opening a new shaft for any mine to which this Act applies;

(2.) Where a shaft of any mine to which this Act applies is abandoned or the working thereof discontinued;

(3.) Where the working of a shaft of any mine to which this Act applies is recommended after any abandonment or discontinuance for a period exceeding two months; or

(4.) Where any change occurs in the name of, or in the name of the owner or agent of, a mine, to which this Act applies, or in the officers of any incorporated company which is the owner of a mine to which this Act applies;

the owner or agent of such mine shall give notice thereof to the inspector of the district within two months after such commencement, abandonment, discontinuance, recommencement, or change, and if such notice is not given, the owner or agent shall be guilty of an offence against this Act.

Provided that—

(1.) This section shall apply only to any working or mine in which more than twelve persons are ordinarily employed below ground; and

(2.) In the case of a partnership working a mine within the stannaries of Devon and Cornwall, if notice of every change in the purser of the partnership is sent as required by this section, notice of a change in the members of such partnership need not be sent in pursuance of this section.[1]

[1] See p. 506 of the 3rd edition of this book.

Fencing of abandoned mine.

13. Where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred,[1] the owner thereof, and every other person interested in the minerals of the mine,[2] shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced [3] for the prevention of accidents.

Provided that—

(1.) Subject to any contract to the contrary, the owner of the mine shall, as between him and any other person interested in the minerals of the mine, be liable to carry into effect this section, and to pay any costs incurred by any other person interested in the minerals of the mine in carrying this section into effect:

(2.) Where such abandonment or discontinuance has occurred in the case of a mine before the passing of this Act, this section shall apply only to such shaft or side entrance of the mine as is situate within fifty yards of any highway, road, footpath, or place of public resort, or in open or unenclosed land, or not being situate as aforesaid, is required by an inspector in writing to be fenced, on the ground that it is specially dangerous:

(3.) Nothing in this section shall exempt any person from any liability under any other Act, or otherwise.

If any person fail to act in conformity with this section he shall be guilty of an offence against this Act.

Any shaft or side entrance which is not fenced as required by this section, and is within fifty yards of any highway, road, footpath, or place of public resort, or is in open or unenclosed land, or is required by an inspector as aforesaid to be fenced, shall be deemed to be a nuisance within the meaning of section eight of the Nuisances Removal Act for England, 1855, as amended and extended by the Sanitary Act, 1866.[4]

[1] The section is therefore retrospective: see s. 26, n. 1, of the Coal Mines Act, 1911, *ante*, p. 605, and Stott *v.* Dickinson, 34 L. T. N. S. 291, there cited.

[2] As to the meaning of "owner," see s. 41, *post*, p. 724, and cases cited, *ante*, p. 78, n. 2, all of which (except R. *v.* Brown) were cases as to fencing, and three of which (Arkwright *v.* Evans, Evans *v.* Mostyn, and Knuckey *v.* Redruth, &c., Council) were decided under the present section. Where the shaft of an abandoned mine contains water, and is used as a public well, the local authority are not the "owners:" Knuckey *v.* Redruth, &c., Council, 1904, 1 K. B. 382. And as to who are liable to fence, as "other persons interested in the minerals of the mine," see s. 26, n. 3, of the Coal Mines Act, 1911, *ante*, p. 605. In mines subject to the Derbyshire customs (see pp. 557 *et seq.* of the 3rd edition of this book), the owner of the soil, and not the miner, is the "owner," and person "interested:" Devonshire *v.* Stokes, 76 L. T. 424; Stokes *v.* Arkwright, 66 L. J. Q. B. 845.

[3] Separate fences must be placed round the top of the shaft and every side entrance. A wall inclosing a field in which both the top of the shaft and a side entrance are contained is not sufficient: Foster *v.* Owen, 9 T. L. R. 22.

[4] Now s. 91 of Pub. Hea. Act, 1875: see s. 313 of the same Act; and see s. 26, n. 5, of the Coal Mines Act of 1911, *ante*, p. 606.

Plans of abandoned mines to be sent to Secretary of State.

14. Where any mine to which this Act applies in which more than twelve persons have ordinarily been employed below ground is abandoned, the owner of such mine at the time of the abandonment shall, within three months after such abandonment, send to a Secretary of State an accurate plan, on a scale of not less than a scale of two chains to one inch, or on such other scale as the plan last used in the mine is constructed on, showing the boundaries of the workings of such mine up to the time of the abandonment, with the view of its being preserved under the care of the Secretary of State; but no person other than an inspector shall be at liberty to inspect or to copy such plan within ten years of its receipt by the Secretary of State without the licence of such Secretary of State.[1]

Every person who fails to comply with this section shall be guilty of an offence against this Act.

[1] A list of the plans deposited in the Home Office has been corrected to 1906. This list is now under revision.

Inspection.

Appointment of inspectors of mines.

15. A Secretary of State may from time to time appoint any fit persons to be inspectors of mines[1] to which this Act applies, and assign them their duties, and may award them such salaries as the Commissioners of Her Majesty's Treasury may approve, and may remove such inspectors.

Notice of the appointment of every such inspector shall be published in the London Gazette.

Any such inspector is referred to in this Act as an inspector, and the inspector of a district means the inspector who is for the time being assigned to the district or portion of the United Kingdom with reference to which the term is used.

Any person appointed or acting as inspector under the Coal Mines

Regulation Act, 1872,[2] if directed by a Secretary of State to act as an inspector under this Act may so act and shall be deemed to be an inspector under this Act.

[1] Inspectors under this Act are also inspectors of quarries; Quarries Act, 1894, s. 2, *post*, p. 729; and in the appointment of inspectors in Wales and Monmouthshire, persons having a knowledge of the Welsh language are to be preferred: *ib.* sub-s. 3, *post*, p. 729.

[2] Now the Coal Mines Act, 1911: see s. 83 of the Coal Mines Regulation Act, 1887, and s. 126 (d) of the Coal Mines Act, 1911, *ante*, p. 664; and as to inspectors under that Act, see Part VII. of the Act of 1911, *ante*, p. 650.

Disqualification of persons as inspectors.

16. Any person who practises or acts or is a partner of any person who practises or acts as a land agent or mining engineer, or as a manager, viewer, agent, or valuer of mines, or arbitrator in any differences arising between owners, agents, or managers of mines, or is otherwise employed in or about any mine (whether such mine is one to which this Act applies or not), shall not act as an inspector of mines under this Act.

Powers of inspectors.

17. An inspector under this Act shall have power to do all or any of the following things; namely,

(1.) To make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act relating to matters above ground or below ground are complied with in the case of any mine to which this Act applies:

(2.) To enter, inspect, and examine any mine to which this Act applies, and every part thereof, at all reasonable times by day and night, but so as not to impede or obstruct the working of the said mine:

(3.) To examine into and make inquiry respecting the state and condition of any mine to which this Act applies, or any part thereof, and the ventilation of the mine, and the sufficiency of the special rules (if any[1]) for the time being in force in the mine, and all matters and things connected with or relating to the safety of the persons employed in or about the mine or any mine contiguous thereto:

(4.) To exercise such other powers as may be necessary for carrying this Act into effect.

Every person who wilfully obstructs any inspector in the execution of his duty under this Act, and every owner and agent of a mine who refuses or neglects to furnish to the inspector the means necessary for making any entry, inspection, examination, or inquiry under this Act in relation to such mine, shall be guilty of an offence against this Act.

[1] See s. 24, *post*, p. 716.

Notice to be given by inspectors of causes of danger not provided for by the rules.

18. If in any respect (which is not provided against by any express provision of this Act, or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice, in or connected with any such mine, to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner or agent of the mine, and shall state in such notice the particulars in which he considers such mine, or any part thereof, or any matter, thing, or practice, to be dangerous or defective, and require the same to be remedied; and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State.

If the owner or agent of the mine objects to remedy the matter complained of in the notice, he may, within twenty days after the receipt of such notice, send his objection in writing, stating the grounds thereof, to a Secretary of State; and thereupon the matter shall be determined by arbitration in manner provided by this Act; and the date of the receipt of such objection shall be deemed to be the date of the reference.

If the owner or agent fail to comply either with the requisition of the notice, where no objection is sent within the time aforesaid, or with the award made on arbitration, within twenty days after the expiration of the time for objection of the time of making of the award (as the case may be), he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence.

Provided that the court, if satisfied that the owner or agent has taken active measures for complying with the notice or award, but has not, with reasonable diligence, been able to complete the works, may adjourn any proceedings taken before them for punishing such offence, and, if the works are completed within a reasonable time, no penalty shall be inflicted.

No person shall be precluded by any agreement from doing such acts as may be necessary to comply with the provisions of this section, or be liable under any contract to any penalty or forfeiture for doing such acts.[1]

[1] As to the powers of an inspector under this section; and, in case of an arbitration ensuing, the question to which the decision of the arbitrator is to be directed, see *Re* Secretary of State and Fletcher, 18 Q. B. D. 339; see also s. 99, notes 1 and 2, of the Coal Mines Act, 1911, *ante*, p. 69. And as to arbitration, see s. 21, *post*, pp. 709, 710.

Plans of mines to be kept.

19. The owner or agent of every mine to which this Act applies shall keep in the office at the mine, or in the principal office of the mines belonging to the same owner in the district in which the mine

is situated, an accurate plan of the workings of such mine, showing the workings up to at least six months previously, other than workings which were last discontinued at a date more than twelve months before the commencement of this Act.

The owner or agent of the mine shall produce to an inspector under this Act, at one of the aforesaid offices, such plan, and shall, if requested by the inspector, mark on such plan the progress of the workings of the mine up to the time of such production, and shall allow the inspector to examine the same.

If the owner or agent of any mine fails to keep such plan as is prescribed by this section, or wilfully refuses to produce or allow to be examined such plan, or wilfully withholds any portion of any plan, or conceals any part of the workings of his mine, or produces an imperfect or inaccurate plan, unless he shows that he was ignorant of such concealment, imperfection, or inaccuracy, he shall be guilty of an offence against this Act; and, further, the inspector may, by notice in writing (whether a penalty for such offence has or has not been inflicted), require the owner or agent to cause an accurate plan, such as is prescribed by this section, to be made within a reasonable time, at the expense of the owner of the mine, on a scale of not less than a scale of two chains to one inch, or on such other scale as the plan used in the mine is constructed on.

If the owner or agent fail within twenty days, or such further time as may be shown to be necessary, after the requisition of the inspector, to make or cause to be made such plan, he shall be guilty of an offence against this Act.

Provided that this section shall apply only to a mine to which this Act applies, and in which more than twelve persons are ordinarily employed below ground.

Inspector to make an annual report and special report when directed.

20. Every inspector under this Act shall make an annual report of his proceedings during the preceding year to a Secretary of State, which report shall be laid before both Houses of Parliament.

A Secretary of State may at any time direct an inspector to make a special report with respect to any accident in a mine to which this Act applies, which accident has caused loss of life or personal injury to any person, and in such case shall cause such report to be made public at such time and in such manner as he thinks expedient.

Arbitration.

Provisions as to arbitrations.

21. With respect to arbitrations under this Act, the following provisions shall have effect:

(1.) The parties to the arbitration are in this section deemed to be the owner or agent of the mine on the one hand, and an inspector of mines on behalf of the Secretary of State on the other :

(2.) Each of the parties to the arbitration may, within twenty-one days after the date of the reference, appoint an arbitrator :

(3.) No person shall act as arbitrator or umpire under this Act who is employed in or in the management of or is interested in the mine [1] to which the arbitration relates :

(4.) The appointment of an arbitrator under this section shall be in writing, and notice of the appointment shall be forthwith sent to the other party to the arbitration, and shall not be revoked without the consent of such other party :

(5.) The death, removal, or other change in any of the parties to the arbitration shall not affect the proceedings under this section :

(6.) If within the said twenty-one days either of the parties fail to appoint an arbitrator, the arbitrator appointed by the other party may proceed to hear and determine the matter in difference, and in such case the award of the single arbitrator shall be final :

(7.) If before an award has been made any arbitrator appointed by either party die or become incapable to act, or for fourteen days refuse or neglect to act, the party by whom such arbitrator was appointed may appoint some other person to act in his place ; and if he fail to do so within fourteen days after notice in writing from the other party for that purpose, the remaining arbitrator may proceed to hear and determine the matters in difference, and in such case the award of such single arbitrator shall be final.

(8.) In either of the foregoing cases where an arbitrator is empowered to act singly, upon one of the parties failing to appoint, the party so failing may, before the single arbitrator has actually proceeded in the arbitration, appoint an arbitrator, who shall then act as if no failure had been made :

(9.) If the arbitrators fail to make their award within twenty-one days after the day in which the last of them was appointed or within such extended time (if any) as may have been appointed for that purpose by both arbitrators under their hands, the matter in difference shall be determined by the umpire appointed as herein-after mentioned :

(10.) The arbitrators, before they enter upon the matters referred to them, shall appoint by writing under their hands an umpire to decide on points on which they may differ :

(11.) If the umpire die or become incapable to act before he has made his award, or refuses to make his award within a reasonable time after the matter has been brought within his cognisance, the persons or person who appointed such umpire shall forthwith appoint another umpire in his place :

(12.) If the arbitrators fail or refuse or for seven days after the request of either party neglect to appoint an umpire, then on the application of either party an umpire shall be appointed by the chairman of the general or quarter sessions of the peace within the jurisdiction of which the mine is situate :

(13.) The decision of every umpire on the matters referred to him shall be final :

(14.) If a single arbitrator fail to make his award within twenty-one days after the day on which he was appointed, the party who appointed him may appoint another arbitrator to act in his place :

(15.) The arbitrators and their umpire, or any of them, may examine the parties and their witnesses on oath, they may also consult any counsel, engineer, or scientific person whom they may think it expedient to consult :

(16.) The payment (if any) to be made to any arbitrator or umpire for his services shall be fixed by the Secretary of State, and together with the costs of the arbitration and award shall be paid by the parties or one of them according as the award may direct. Such cost may be taxed by a master of one of the superior courts, who, on the written application of either of the parties, shall ascertain and certify the proper amount of such costs. The amount (if any) payable by the Secretary of State shall be paid as part of the expenses of inspectors under this Act. The amount (if any) payable by the owner or agent may in the event of non-payment be recovered in the same manner as penalties under this Act :

(17.) Every person who is appointed an arbitrator or umpire under this section shall be a practical mining engineer, or a person accustomed to the working of mines, but when an award has been made under this section the arbitrator or umpire who made the same shall be deemed to have been duly qualified as provided by this section.

[1] The words "interested in the mine" would probably be held to have a wider meaning than "interested in the minerals" in ss. 13 and 41, *ante*, p. 709, and *post*, p. 724 ; cf. s. 22 (7), *post*, p. 711.

Coroners.

Provisions as to coroners' inquests on deaths from accidents in mines.

22. With respect to coroners' inquests on the bodies of persons whose death may have been caused by explosions or accidents in mines to which this Act applies, the following provisions shall have effect:

(1.) Where a coroner holds an inquest upon a body of any person whose death may have been caused by any explosion or accident, of which notice is required by this Act to be given to the inspector of the district, the coroner shall adjourn such inquest unless an inspector, or some person on behalf of a Secretary of State, is present to watch the proceedings:

(2.) The coroner, at least four days before holding the adjourned inquest, shall send to the inspector of the district notice in writing of the time and place of holding the adjourned inquest:

(3.) The coroner, before the adjournment, may take evidence to identify the body, and may order the interment thereof:

(4.) If an explosion or accident has not occasioned the death of more than one person, and the coroner has sent to the inspector of the district notice of the time and place of holding the inquest not less than forty-eight hours before the time of holding the same, it shall not be imperative on him to adjourn such inquest in pursuance of this section, if the majority of the jury think it unnecessary so to adjourn:

(5.) An inspector shall be at liberty at any such inquest to examine any witness, subject nevertheless to the order of the coroner:

(6.) Where evidence is given at an inquest at which an inspector is not present of any neglect as having caused or contributed to the explosion or accident, or of any defect in or about the mine appearing to the coroner or jury to require a remedy, the coroner shall send to the inspector of the district notice in writing of such neglect or default:

(7.) Any person having a personal interest in [1] or employed in or in the management of the mine in which the explosion or accident occurred shall not be qualified to serve on the jury empanelled on the inquest; and it shall be the duty of the constable or other officer not to summon any person disqualified under this provision, and it shall be the duty of the coroner not to allow any such person to be sworn or to sit on the jury.

Every person who fails to comply with the provisions of this section shall be guilty of an offence against this Act.

[1] See s. 21, n. 1, *ante*, p. 710.

Part 2.

Rules.

General Rules.

General rules:

23. The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies : [1]

[1] The present section corresponds with ss. 49 and 50 of the Coal Mines Regulation Act, 1887 ; and s. 24 corresponds with s. 51 of that Act. The decisions under ss. 49 to 51 of the Act of 1887 which are collected in n. 1 to s. 2 and n. 3 to s. 75 of the Coal Mines Act, 1911, *ante*, pp. 585, 635, are therefore equally applicable to the corresponding sections of this Act ; and see s. 6, n. 1, *ante*, p. 697.

The general and special rules have equal force, the obligation in both cases being limited by the "distributive" words "as far as may be reasonably practicable" in s. 23 : see Watkyns *v.* Naval Colliery, 1911, 2 K. B. 162, Butler (or Black) *v.* Fife Coal Co., 1912, A. C. 149, 163, as to general and special rules under the Coal Mines Regulation Act, 1887. This case shows that in this context the words "reasonably practicable" bear a different construction from that propounded in Wales *v.* Thomas, 16 Q. B. D. 340.

The criminal and civil liability of owners in respect of breaches of the statutory duties imposed by the Act has already been considered : see s. 6, n. 1, *ante*, p. 697.

Ventilation.

(1.) An adequate amount of ventilation shall be constantly produced in every mine to such an extent that the shafts, winzes, sumps, levels, underground stables, and working places of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.[1]

[1] See n. 1 to s. 29 of the Coal Mines Act, 1911 (*ante*, p. 25), and cases there cited.

Gunpowder and blasting.

(2.) Gunpowder or other explosive or inflammable substance shall only be used underground in the mine as follows : [1]

(*a.*) It shall not be stored in the mine :

(*b.*) It shall not be taken into the mine, except in a case [2] or canister containing not more than four pounds :

(*c.*) A workman shall not have in use at one time in any one place more than one of such cases or canisters :

(*d.*) In charging holes for blasting, except in mines excepted from the operation of this section by the Secretary of State, an iron or steel pricker shall not be used, and a person shall not have in his possession in the mine underground any iron or steel pricker, and an iron or steel tamping rod or stemmer shall not be used for ramming either the wadding or the first part of the tamping or stemming on the powder :

(*e.*) A charge of powder which has missed fire shall not be unrammed.

[1] As to the exemption of slate mines from this provision, see the Slate Mines

(Gunpowder) Act, 1882, *post*, p. 726. As to an inspector under this Act acting as a Government inspector under the Explosives Act, 1875, see s. 59 of that Act, cited *ante*, p. 630.

[2] "Case" means something sufficiently solid and substantial to protect the gunpowder from exploding. A linen or calico bag is not a "case": Foster *v.* Diphwys, &c., Co., 18 Q. B. D. 428.

Man-holes in self-acting or engine planes.

(3.) Every underground plane on which persons travel, which is self-acting, or worked by an engine, windlass, or gin, shall be provided (if exceeding thirty yards in length) with some proper means of signalling between the stopping places and the ends of the plane, and shall be provided in every case, at intervals of not more than twenty yards, with sufficient man-holes for places of refuge.[1]

[1] See notes to s. 44 of the Coal Mines Act, 1911, *ante*, p. 623.

Spaces in horse roads.

(4.) Every road on which persons travel underground, where the produce of the mine in transit exceeds ten tons in any one hour over any part thereof, and where the load is drawn by a horse or other animal, shall be provided, at intervals of not more than one hundred yards, with sufficient spaces for places of refuge,[1] each of which spaces shall be of sufficient length, and of at least three feet in width between the waggons running on the tramroad and the side of the road; and the Secretary of State may, if he see fit, require the inspector to certify whether the produce of the mine in transit on the road aforesaid does or does not ordinarily exceed the weight as aforesaid.

[1] See notes mentioned in preceding note.

Keeping spaces clear.

(5.) Every man-hole and space for a place of refuge shall be constantly kept clear, and no person shall place anything in a man-hole or such space so as to prevent access thereto.

Fencing of old shafts.

(6.) The top of every shaft which was opened before the commencement of the actual working for the time being of the mine and has not been used during such actual working shall, if so required in writing by the inspector of the district, be securely fenced, and the top of every other shaft which for the time being is out of use, or used only as an air shaft, shall be securely fenced.[1]

[1] The obligation imposed by this rule is not an obligation to keep fenced, but to fence securely. The rule merely requires a proper fence to be provided; and the owner is not liable for a breach of the rule because the door of the fence is left open: Sinnerton *v.* Merry, 13 R. 1012, a Scotch decision under a similar provision in the Coal Mines Regulation Act, 1872. Cf. s. 37 of the Coal Mines Act, 1911, and see the notes to that section, *ante*, p. 615.

Fencing of entrances to shafts.

(7.) The top and all entrances between the top and bottom of every working or pumping shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for

the purpose of repairs or other operations, if proper precautions are used.[1]

[1] See note to rule 6.

Securing of shafts.

(8.) Where the natural strata are not safe, every working or pumping shaft shall be securely cased, lined, or otherwise made secure.

Division of shaft.

(9.) Where one portion of a shaft is used for the ascent and descent of persons by ladders or a man-engine, and another portion of the same shaft is used for raising material gotten in the mine, the first-mentioned portion shall be cased or otherwise securely fenced off from the last-mentioned portion.[1]

[1] See notes to rule 6, *supra*.

Signalling.

(10.) Every working shaft[1] in which persons are raised shall, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in work between the surface and the bottom of the shaft to the surface, and from the surface to the bottom of the shaft and to every entrance for the time being in work between the surface and the bottom of the shaft.

[1] A shaft becomes a working shaft immediately men are required to descend it for the purpose of carrying on mining operations, even though such operations do not consist of actually getting minerals, but merely of driving tunnels or doing other works for the purpose of arriving at the minerals: Foster *v.* The North Hendre Mining Co., Limited, 1891, 1 Q. B. 71. Whether a shaft can be a working shaft before it is itself completed, was not decided: *ib.* at p. 73.

Cover overhead.

(11.) A sufficient cover overhead shall be used when lowering or raising persons in every working shaft, except where it is worked by a windlass, or where the person is employed about the pump or some work of repair in the shaft, or where a written exemption is given by the inspector of the district.[1]

[1] In Frecheville *v.* Souden, 48 L. T., N. S. 612, a mine had two shafts, one provided with a man-engine with a proper cover for miners, and the others with an open box for minerals. It was held that miners who, while the man-engine was at work, got into and were raised by the open box, broke this rule.

Chains.

(12.) A single linked chain shall not be used for lowering or raising persons in any working shaft or plane except for the short coupling chain attached to the cage or load.

Slipping of rope on drum.

(13.) There shall be on the drum of every machine used for lowering or raising persons such flanges or horns, and also if the drum is conical, such other appliances, as may be sufficient to prevent the rope from slipping.[1]

[1] See s. 40, n. 5, of the Coal Mines Act, 1911, *ante*, p. 618.

(14.) There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break, and also a proper indicator (in addition to any mark on the rope) which shows to the person who works the machine the position of the cage or load in the shaft.[1] Break.

[1] See s. 40, n. 6, of the Coal Mines Act, 1911, *ante*, p. 618.

(15.) A ladder permanently used for the ascent or descent of persons in the mine shall not be fixed in a vertical or overhanging position, and shall be inclined at the most convenient angle which the space in which the ladder is fixed allows, and every such ladder shall have substantial platforms at intervals of not more than twenty yards. Inclination of ladders.

(16.) If more than twelve persons are ordinarily employed in the mine below ground, sufficient accommodation shall be provided above ground near the principal entrance of the mine, and not in the engine-house or boiler-house, for enabling the persons employed in the mine to conveniently dry and change their dresses. Dressing room.

(17.) Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and be kept securely fenced.[1] Fencing machinery.

[1] See s. 55, n. 1, of the Coal Mines Act, 1911, *ante*, p. 626.

(18.) Every steam boiler shall be provided with a proper steam gauge and water gauge, to show respectively the pressure of steam and the height of water in the boiler, and with a proper safety valve.[1] Gauges to boilers and safety valve.

[1] See s. 56, n. 1, of the Coal Mines Act, 1911, *ante*, p. 627.

(19.) No person shall wilfully damage, or without proper authority remove or render useless, any fencing, casing, lining, guide, means of signalling, signal, cover, chain, flange, horn, break, indicator, ladder, platform, steam gauge, water gauge, safety valve, or other appliance or thing provided in any mine in compliance with this Act.[1] Wilful damage.

[1] See also s. 32, *post*, p. 719. And see further, as to malicious injuries, *ante*, pp. 551 *et seq.*

Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act, and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner and agent of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing

and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.[1]

[1] See s. 23, n. 1, *ante*, p. 712; see also notes to ss. 2 and 75 of the Coal Mines Act, 1911, *ante*, pp. 585, 635, and cases there cited.

Special Rules.

Special rules.

24. The owner or agent of any mine to which this Act applies may, if he think fit, transmit to the inspector of the district, for approval by a Secretary of State, rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine or employed in or about the same, so as to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, and such special rules, when established, shall be signed by the inspector who is inspector of the district at the time such rules are established, and shall be observed in and about every such mine in the same manner as if they were enacted in this Act.[1]

If any person who is bound to observe the special rules established for any mine acts in contravention of or fails to comply with any of such special rules, he shall be guilty of an offence against this Act, and also the owner and agent of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.[2]

[1] The establishment of special rules is not compulsory; but the Secretary of State has power under s. 27 (*post*, p. 717) to propose and establish special rules subject to the arbitration provisions of the Act, where the owner or agent takes no steps to do so. As to the effect of special rules when established, see s. 23, n. 1, *ante*, p. 712; and notes to ss. 86 and 87 of the Coal Mines Act, 1911, *ante*, pp. 644, 645, and cases there cited.

Where special rules had been established for a quarry (to which this Act applies, see Quarries Act, 1894, *post*, p. 145), and which was being worked under a lease, and the lease ran out, and after an interval a fresh lease of the same quarry was granted to another lessee, it was held that the rules established by the previous lessee did not apply: Gordon *v.* Anderson, 1910, S. C. 26. It is doubtful whether the same result would follow if the quarry or mines were taken over as a going concern.

[2] See notes to s. 75 of the Coal Mines Act, 1911, *ante*, p. 635.

Establishment of special rules.

25. The proposed special rules, together with a printed notice specifying that any objection to such rules on the ground of anything contained therein or omitted therefrom may be sent by any of the persons employed in the mine to the inspector of the district, at his address, stated in such notice, shall, during not less than two weeks

before such rules are transmitted to the inspector, be posted up in like manner as is provided in this Act respecting the publication of special rules for the information of persons employed in the mine, and a certificate that such rules and notice have been so posted up shall be sent to the inspector with the rules signed by the person sending the same.

If the rules are not objected to by the Secretary of State within forty days after their receipt by the inspector they shall be established.

If the owner or agent makes any false statement with respect to the posting up of the rules and notices he shall be guilty of an offence against this Act.

Secretary of State may object to special rules.

26. If the Secretary of State is of opinion that the proposed special rules so transmitted, or any of them, do not sufficiently provide for the prevention of dangerous accidents in the mine, or for the safety of the persons employed in or about the mine, or are unreasonable, he may, within forty days after the rules are received by the inspector, object to the rules, and propose to the owner or agent in writing any modifications in the rules by way either of omission, alteration, substitution, or addition.

If the owner or agent do not, within twenty days after the modifications proposed by the Secretary of State are received by him, object in writing to them, the proposed special rules, with such modifications, shall be established.

If the owner or agent sends his objection in writing within the said twenty days to the Secretary of State, the matter shall be referred to arbitration,[1] and the date of the receipt of such objection by the Secretary of State shall be deemed to be the date of the reference, and the rules shall be established as settled by an award on arbitration.

[1] See s. 21, *ante*, p. 708.

Amendment of special rules.

27. After special rules are established under this Act in any mine, the owner or agent of such mine may from time to time propose in writing to the inspector of the district for the approval of a Secretary of State any amendment of such rules or any new special rules, and the provisions of this Act with respect to the original special rules shall apply to all such amendments and new rules in like manner, as near as may be, as they apply to the original rules.

A Secretary of State may from time to time propose in writing to the owner or agent of a mine in which there are no special rules, any special rules, and to the owner or agent of a mine in which there are special rules, any new special rules, or any amendment to such special rules, and the provisions of this Act with respect to a proposal of the

Secretary of State for modifying the special rules transmitted by the owner or agent of a mine shall apply to all such proposed special rules, new special rules, and amendments in like manner, as near as may be, as they apply to such proposal.

Publication of rules.

28. For the purpose of making known the special rules (if any) and the provisions of this Act to all persons employed in and about each mine to which this Act applies, an abstract of the Act supplied, on the application of the owner or agent of the mine, by the inspector of the district on behalf of a Secretary of State, and an entire copy of the special rules (if any) shall be published as follows :

(1.) The owner or agent of such mine shall cause such abstract and rules (if any), with the name and address of the inspector of the district, and the name of the owner or agent appended thereto, to be posted up in legible characters, in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed ; and so often as the same became defaced, obliterated, or destroyed, shall cause them to be renewed with all reasonable despatch :

(2.) The owner or agent shall supply a printed copy of the abstract and the special rules (if any) gratis to each person employed in or about the mine who applies for such copy at the office at which the persons immediately employed by such owner or agent are paid :

(3.) Every copy of the special rules shall be kept distinct from any rules which depend only on the contract between the employer and employed.

If any owner or agent fail to act in compliance with this section he shall be guilty of an offence against this Act, but the owner shall not be deemed guilty if he prove that he has taken all reasonable means,[1] by enforcing the observance of this section, to prevent such non-compliance.

[1] Cf. notes to ss. 2 and 75 of the Coal Mines Act, 1911, *ante*, pp. 585, 635.

Punishment for defacing notices.

29. Every person who pulls down, injures, or defaces any proposed special rules, notice, abstract, or special rules when posted up in pursuance of the provisions of this Act with respect to special rules, or any notice posted up in pursuance of the special rules, shall be guilty of an offence against this Act.

Certified copy of special rules to be evidence.

30. An inspector under this Act shall, when required, certify a copy which is shown to his satisfaction to be a true copy of any special rules which for the time being are established under this Act in any mine, and a copy so certified shall be evidence (but not to the

exclusion of other proof) of such special rules and of the fact that they are duly established under this Act, and have been signed by the inspector.

Part 3.

Supplemental.

Penalties.

Penalty for offences against Act.

31. Every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which in the case of an owner or agent would be an offence against this Act, shall be deemed to be guilty of an offence against this Act.

Every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is an owner or agent, twenty pounds, and if he is any other person two pounds, for each offence; and if an inspector has given written notice of any such offence, to a further penalty not exceeding one pound for every day after such notice that such offence continues to be committed.[1]

[1] See s. 101, n. 2, of the Coal Mines Act, 1911, *ante*, p. 654.

Imprisonment for wilful neglect endangering life or limb.

32. Where a person who is an owner or agent or a person employed in or about a mine is guilty of any offence against this Act which, in the opinion of the court that tries the case, is one which was reasonably calculated to endanger the safety of the persons employed in or about the mine, or to cause serious personal injury to any of such persons, or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, such person shall be liable, if the court is of opinion that a pecuniary penalty will not meet the circumstances of the case, to imprisonment, with or without hard labour, for a period not exceeding three months.[1]

If any person feel aggrieved by any conviction made by a court of summary jurisdiction on determining any information under this Act, by which conviction imprisonment is adjudged in pursuance of this section, or by which conviction the sum adjudged to be paid amounts to or exceeds half the maximum penalty, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following:

(1.) The appeal shall be made to the next court of general or quarter sessions for the county,[2] division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the decision of the court from which the appeal is made:

(2.) The appellant shall, within seven days after the cause of

appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and of the ground thereof:

(3.) The appellant shall, immediately after such notice, enter into a recognisance before a justice of the peace, with two sufficient sureties, conditioned personally to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court, or give such other security by deposit of money or otherwise as the justice may allow:

(4.) The justice may, if he think fit, on the appellant entering into such recognisance or giving such other security as aforesaid, release him from custody:

(5.) The court of appeal may adjourn the appeal, and upon the hearing thereof they may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter to the court of summary jurisdiction with the opinion of the court of appeal thereon, or make such other order in the matter as the court thinks just. The court of appeal may also make such order as to costs to be paid by either party as the court thinks just:

Provided that in Scotland—

(1.) This section shall not apply to any conviction made by a sheriff:

(2.) The term "entering into a recognisance before a justice of the peace" shall mean finding caution with the clerk of the justices of the peace to the satisfaction of a justice of the peace, and the term "recognisance" shall mean a bond of caution:

(3.) It shall be competent to any person empowered to appeal by this section, to appeal against a conviction by a sheriff [3] to the high court of justiciary [3] in the manner prescribed by such of the provisions of the Act of the twentieth year of the reign of King George the Second, chapter forty-three and any Acts amending the same, as relate to appeals in matters criminal, and by and under the rules, limitations, conditions, and restrictions contained in the said provisions.

[1] See also r. 19 of s. 23, *ante*, p. 715.

[2] The remainder of clause 1, and clauses 2, 3, 4, and 5 were repealed as to England by s. 4 of the Sum. Jur. Act, 1884. The corresponding provisions are contained in the Sum. Jur. Acts.

[3] The Stat. Law Rev. (No. 2) Act, 1893, repealed some words which are here omitted.

Summary proceedings for offences, penalties, &c.

33. All offences and penalties under this Act, and all money and costs by this Act directed to be recovered as penalties, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts [1] before a court of summary jurisdiction.

The "Court of Summary Jurisdiction," [1] when hearing and determining an information or complaint, shall be constituted—

(*a.*) In England, either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions, or of some magistrate or officer for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace, and sitting alone or with others at some court or other place appointed for the administration of justice; or

(*b.*) In Scotland, of two or more justices of the peace sitting as judges in a justice of the peace court, or of the sheriff or some other magistrate or officer for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace, and sitting alone or with others at some court or other place appointed for the administration of justice; or

(*c.*) In Ireland, within the police district of Dublin metropolis, of one of the divisional justices of that district sitting at a police court within the district, and elsewhere of two or more justices of the peace sitting in petty sessions at a place appointed for holding petty sessions.

[1] As to the meaning of "Summary Jurisdiction Acts," and "Court of Summary Jurisdiction," see s. 13 of the Interpretation Act, 1889.

General provisions as to summary proceedings.

34. In every part of the United Kingdom the following provisions shall have effect:

(1.) Any complaint or information made or laid in pursuance of this Act shall be made or laid within three months from the time when the matter of such complaint or information respectively arose:

(2.) The description of any offence under this Act in the words of this Act shall be sufficient in law: [1]

(3.) Any exception, exemption, proviso, excuse, or qualification, whether it does or not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant: [1]

(4.) The owner or agent may, if he think fit, be sworn and examined as an ordinary witness in the case where he is charged in respect of any contravention or non-compliance by another person :

(5.) The court shall, if required by either party, cause minutes of the evidence to be taken and preserved.

[1] Sub-ss. 2 and 3 of this section were repealed as to England by s. 4 of the Sum. Jur. Act, 1884. The corresponding provisions are contained in s. 39, sub-ss. 1 and 2, of the Sum. Jur. Act, 1879.

This section only refers to the general description of the offence, and does not justify the omission to specify the precise circumstances in which the defendant is alleged to have committed the offence : Smith *v.* Moody, 1903, 1 K. B. 56, 60, 63.

Prosecution for offences.

35. No prosecution shall be instituted against the owner or agent of a mine to which this Act applies for any offence under this Act which can be prosecuted before a court of summary jurisdiction, except by an inspector,[1] or with the consent in writing of a Secretary of State ; and in the case of any offence of which the owner or agent of a mine is not guilty, if he proves that he had taken all reasonable means [2] to prevent the commission thereof, an inspector shall not institute any prosecution against such owner or agent, if satisfied that he had taken such reasonable means as aforesaid.

[1] This provision does not exclude s. 10 of Jervis' Act (11 & 12 Vict. c. 43). An information may therefore be laid by the agent of an inspector, if the inspector has exercised his discretion upon the case, and has determined that proceedings shall be taken : Foster *v.* Fyfe, 1896, 2 Q. B. 104.

[2] Cf. notes to s. 75 of the Coal Mines Act, 1911, *ante*, p. 635.

Summary proceedings for offences in Scotland.

36. In Scotland the following provisions shall have effect :

(1.) All jurisdictions, powers, and authorities necessary for the court of summary jurisdiction under this Act are hereby conferred on that court :

(2.) Every person found liable under this Act in any penalty, or to pay any money or costs by this Act directed to be recovered as penalties, shall be liable in default of immediate payment to be imprisoned for a term not exceeding three months, and the conviction and warrant may be in the form of No. 3 of Schedule K of the Summary Procedure Act, 1864.[1]

[1] See Dykes *v.* Merry, 7 M. 603 ; and Nimmo *v.* Clark, 10 M. 477 ; decided under a former Act.

Persons not to be punished twice for the same offence.

37. Nothing in this Act shall prevent any person from being indicted or liable under any other Act or otherwise to any other or higher penalty or punishment than is provided for any offence by this Act, so that no person be punished twice for the same offence.

If the court before whom a person is charged with an offence under this Act think that proceedings ought to be taken against such person for such offence under any other Act or otherwise, the court may adjourn the case to enable such proceedings to be taken.

Application of penalties.

38. Where a penalty is imposed under this Act for neglecting to send a notice of any explosion or accident, or for any offence against this Act which has occasioned loss of life or personal injury, the Secretary of State may (if he think fit) direct such penalty to be paid to or distributed among the persons injured, and the relatives of any persons whose death may have been occasioned by such explosion, accident, or offence, or among some of them:

Provided that—

(1.) Such persons did not in his opinion occasion or contribute to occasion the explosion or accident, and did not commit and were not parties to committing the offence:

(2.) The fact of such payment or distribution shall not in any way affect or be receivable as evidence in any legal proceeding relative to or consequential on such explosion, accident, or offence:

Save as aforesaid, all penalties imposed in pursuance of this Act shall be paid into the receipt of Her Majesty's Exchequer, and shall be carried to the Consolidated Fund.

In Ireland all penalties imposed and recovered under this Act shall be applied in manner directed by the Fines Act (Ireland), 1851, and any Act amending the same.

Miscellaneous.

As to question whether mine is a mine under this Act.

39. If any question arises whether a mine is a mine to which this Act, or the Coal Mines Regulation Act, 1872,[1] applies, such question shall be referred to a Secretary of State, whose decision thereon shall be final.[2]

[1] Now the Coal Mines Act, 1911: see s. 126 of that Act, *ante*, p. 80, and s. 83 of the Coal Mines Regulation Act, 1887.

[2] A corresponding provision is contained in the Coal Mines Act, 1911: see s. 113, *ante*, p. 659. As to the mines to which the Coal Mines Acts and the Met. Mines Acts respectively apply, see s. 3 of this Act, *ante*, p. 695; and Coal Mines Act, 1911, s. 1, *ante*, p. 584.

Notices may be served by post.

40. All notices under this Act shall be in writing or print, or partly in writing and partly in print, and all notices and documents required by this Act to be served or sent by or to an inspector or Secretary of State may be either delivered personally, or served and sent by post, by a prepaid letter, and if served or sent by post shall be deemed to have been served and received respectively at the time

when the letter containing the same would be delivered in the ordinary course of post; and in proving such service or sending, it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post.

41. In this Act, unless the context otherwise requires,—

Interpretation of terms.

The term "mine" includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways, and sidings, both below ground and above ground, in and adjacent to a mine, and any such shaft, level, and inclined plane, and belonging to the mine: [1]

The term "shaft" includes pit:

The term "plan" includes a map and section, and a correct copy or tracing of any original plan as so defined:

The term "owner" when used in relation to any mine means any person or body corporate who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines: [2]

The term "agent" when used in relation to any mine means any person having, on behalf of the owner, care or direction of any mine, or of any part thereof:

The term "Secretary of State" means one of Her Majesty's principal Secretaries of State:

The term "Court of Summary Jurisdiction" [3] means—

In England and Ireland, any justice or justices of the peace, metropolitan police magistrate, stipendiary or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to:

In Scotland, any justice or justices of the peace, sheriff, or other magistrate, to the proceedings before whom for the trial or prosecution of any offence, or for the recovery of any penalty under any Act of Parliament, the provisions of the Summary Jurisdiction Acts may be applied.

[1] See s. 3 of the Notice of Accidents Act, 1906, *ante*, p. 700.

[2] As to the definition of "owner," see s. 122, n. 2, Coal Mines Act, 1911 (*ante*, p. 661), and cases there cited, three of which (Arkwright *v.* Evans, Evans

v. Mostyn, and Knuckey *v.* Redruth, &c., Council) were decided under the present section. As to the words "not interested in the minerals of the mines," see *ib.*, and *ante*, p. 705, n. 2. As to mines subject to the Derbyshire customs, see *ante*, p. 705, n. 2.

[3] This section contained a definition of Sum. Jur. Acts, which was repealed by Stat. Law Rev. (No. 2) Act, 1893; and see s. 33, n. 1, *ante*, p. 721.

Application of Act to Scotland.

42. In the application of this Act to Scotland—

(1.) The term "chairman of quarter sessions" means the sheriff of the county:

(2.) The term "sheriff" includes "sheriff substitute:"

(3.) The Queen's and Lord Treasurer's Remembrancer shall perform the duties of a master of one of the superior courts under this Act:

(4.) Notices of explosions, accidents, and loss of life, or personal injury shall be deemed to be sent to the inspector of the district on behalf of the Lord Advocate:

(5.) Section sixteen of "The Public Health (Scotland) Act, 1867," shall be substituted for "section eight of the Nuisances Removal Act for England, 1855," as amended and extended by the Sanitary Act, 1866.

Application of Act to the Isle of Man.

43. This Act shall apply to the Isle of Man,[1] with the following modifications:

(1.) The term "chairman of quarter sessions" means the governor, lieutenant governor, or deputy governor of the said Isle for the time being:

(2.) The clerk of the rolls shall perform the duties of a master of one of the superior courts under this Act:

(3.) The law of the said Isle as to the abatement or removal of nuisances affecting the health of Her Majesty's subjects shall be substituted for section eight of "The Nuisances Removal Act for England, 1855," as amended and extended by "The Sanitary Act, 1866."

[1] See further, the Met. Mines (Isle of Man) Act, 1891, *post*, p. 726.

44. [Repealed Stat. Law Rev. (No. 2) Act, 1893.]

45, and Schedule. [Repealed Stat. Law Rev. Act, 1883.]

b.—THE SLATE MINES (GUNPOWDER) ACT, 1882.

(45 & 46 *Vict. c.* 3.)

An Act to amend the law relating to the use of Gunpowder in Slate Mines. [29th March, 1882.]

Title of Act.

1. This Act may be cited as the Slate Mines (Gunpowder) Act, 1882.

Power to exempt slate mines from certain regulations relating to the use of explosives.

2. (1.) It shall be lawful for one of Her Majesty's Principal Secretaries of State, if he shall think fit, from time to time, on the application of the owner, agent, or manager of any slate mine,[1] to exempt such mine from the general rule contained in sub-section two of section twenty-three [2] of the Metalliferous Mines Regulation Act, 1872, with respect to the use of gunpowder or other explosive substances, or any portion of such rule.

(2.) The application shall be transmitted by the owner, agent, or manager to the inspector of the district, and the requirements of sections twenty-four and twenty-eight [3] of the Metalliferous Mines Regulation Act, 1872, as to the posting of any proposed special rule shall extend to any such application: Provided that the exemption shall not come into force until granted by the Secretary of State.

35 & 36 Vict. c. 77.

(3.) The Secretary of State may at any time revoke such exemption, but such revocation shall not come into force until written or printed notice thereof has been posted up at the mine for twenty-four hours.

(4.) A list of the exemptions granted or revoked under this Act shall be set forth by the inspector of the district in his annual report.

[1] A slate mine worked by underground workings by levels has been held to be a mine within the Met. Mines Reg. Act, 1872: Sim. *v.* Evans, 23 W. R. 730.
[2] *Ante*, p. 712.
[3] *Ante*, pp. 716, 718.

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c.—THE METALLIFEROUS MINES (ISLE OF MAN) ACT, 1891.

(54 & 55 *Vict. c.* 47.)

An Act to amend the Metalliferous Mines Regulation Act, 1872, in its application to the Isle of Man.

[5th August, 1891.]

35 & 36 Vict. c. 77.

Whereas it is expedient to amend the Metalliferous Mines Regulation Act, 1872, (herein-after referred to as the principal Act) in its application to the Isle of Man:

Application

1. In the application of the principal Act to the Isle of Man the

following modifications shall be made in addition to those mentioned in section forty-three [1] of the principal Act : of Act to Isle of Man.

(1.) The expression " court of summary jurisdiction " shall mean a high bailiff or two justices of the peace :

(2.) The expression " Summary Jurisdiction Acts " shall mean the Act of Tynwald, the short title of which is the Petty Sessions Act, 1864, and any Acts for the time being in force amending the same :

(3.) An appeal from a decision given or conviction made by a court of summary jurisdiction shall be made in conformity with the Summary Jurisdiction Acts, but no general appeal shall be allowed except in the case in which an appeal to the court of general or quarter sessions is allowed under section thirty-two [2] of the principal Act :

(4.) Section thirty-four [3] of the principal Act shall apply to the Isle of Man as well as to the United Kingdom :

(5.) Any prosecution in respect of an offence punishable on summary conviction under the principal Act, other than a prosecution against an owner or agent of a mine, may be in the name of an inspector or of a superintendent or inspector of police or of a person injured or aggrieved, and in any such prosecution the owner of the mine shall, as to any offence in relation to his mine, be deemed to be the person aggrieved.

[1] *Ante*, p. 725.
[2] *Ante*, p. 719.
[3] *Ante*, p. 721.

2. This Act may be cited as the Metalliferous Mines (Isle of Man) Act, 1891, and shall be construed as one with the principal Act. Short title and construction.

SECT. 3.—QUARRIES.

a.—THE QUARRY (FENCING) ACT, 1887.

(50 & 51 *Vict. c.* 19.)

An Act to provide for the Fencing of Quarries.

[19th July, 1887.]

Whereas it is expedient to provide for the fencing of quarries in England and Wales :

1. This Act may be cited as the Quarry (Fencing) Act, 1887. Short title.

2. This Act shall not come into operation until the first day of January, 1888. Commencement of Act.

Fencing of quarries.

3. Where any quarry dangerous to the public is in open or unenclosed land, within fifty yards of a highway or place of public resort dedicated to the public, and is not separated therefrom by a secure and sufficient fence, it shall be kept reasonably fenced for the prevention of accidents, and unless so kept shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875.[1]

[1] See s. 26, n. 5, of the Coal Mines Act, 1911, *ante*, p. 606.

The Public Health Acts Amendment Act, 1907, s. 30, enacts that "if in any situation fronting adjoining or abutting on any street . . . any excavation or bank is for want of sufficient . . . enclosure dangerous to persons lawfully using the street," the local authority may require the owner to enclose the same so as to prevent any danger therefrom, and, on his default, may enclose the same and recover the expense thereof from him summarily as a civil debt. Under this section a person may be liable to fence an excavation, although the greater part of it consists of a chalk pit, which he does not own: Carshalton U. D. C. *v.* Burrage, 1911, 2 Ch. 133.

4. In this Act—

Interpretation.

The term "quarry" includes every pit or opening made for the purpose of getting stone, slates, lime, chalk, clay, gravel, or sand, but not any natural opening.

Extent of Act.

5. This Act shall not extend to Scotland and Ireland.

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b.—THE QUARRIES ACT, 1894.

(57 & 58 *Vict. c.* 42.)

An Act to provide for the better Regulation of Quarries.

[25th August, 1894.]

Application of Act.

1. This Act shall apply to every place (not being a mine) in which persons work in getting slate,[1] stone, coprolites, or other minerals,[2] and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act.

[1] A slate mine worked by underground workings by means of levels was held to be a mine within the Met. Mines Reg. Act, 1872: Sim *v.* Evans, 23 W. R. 730.

[2] Furnace slag deposited in a heap is not a "mineral," nor is the place of deposit a "quarry," within this section: Scott *v.* Mid. R. Co., 13 T. L. R. 398. Gravel and sand are, however, "minerals" within this section: Scott *v.* Mid. R. Co., 1901, 1 K. B. 317. And the place from which they are taken is a "quarry" within this section; and is so none the less because it is a place in which workmen are engaged "in the course of working the railway" within s. 6 of the Reg. of Railways Act, 1871: *ib.*

Application to quarries of certain provisions of 35 & 36 Vict. c. 77, 38 & 39 Vict. c. 39, 54 & 55 Vict. c. 47.

2. (1.) The provisions of the Metalliferous Mines Regulation Acts, 1872 and 1875, and the Metalliferous Mines (Isle of Man) Act, 1891, specified in the Schedule to this Act, shall, subject to the modifications therein specified, apply in the case of every quarry under this Act in like manner as they apply in the case of a mine.[1]

(2.) The inspectors under the Metalliferous Mines Regulation Acts, 1872[2] and 1875, shall be inspectors of the quarries under this Act.

(3.) In the appointment of such inspectors in Wales and Monmouthshire among candidates equally qualified persons having a knowledge of the Welsh language shall be preferred.

[1] See Scott *v.* Mid. R. Co., 1901, 1 K. B. 317; Gordon *v.* Anderson, 1910, S. C. 26.

[2] See s. 15, *ante*, p. 705.

Modifications of application of Factory Acts to quarries.

3. In the application of the Factory and Workshop Acts, 1878 to 1891, and of any future Act amending the same, to quarries under this Act, the following modifications shall be made :—

(*a.*) In every such quarry the powers of the inspectors under those Acts shall be transferred to and exercised by the inspectors under the Metalliferous Mines Regulation Acts, 1872 and 1875 :

(*b.*) Sections thirty-one and thirty-two of the Factory and Workshop Act, 1878, shall not apply to any such quarry :

(*c.*) Nothing in section fifty-eight of the Factory and Workshop Act, 1878, shall prevent the employment in any such quarry of young persons in three shifts for not more than eight hours each.[1]

[1] These Fact. and Work. Acts are now repealed : see Fact. and Works. Act, 1901, sch. 7 ; and see *post*, Chap. XXII.

Commencement of Act.

4. This Act shall come into operation on the first day of January, one thousand eight hundred and ninety-five.

Short title.

5. This Act may be cited as the Quarries Act, 1894.

SCHEDULE.

Section 2.

PROVISIONS OF METALLIFEROUS MINES ACTS APPLIED TO QUARRIES.

Metalliferous Mines Regulation Act, 1872 (35 *&* 36 *Vict. c.* 77).

Section nine.

Section eleven, with the substitution of the word "explosive" for the word "powder."

Sections fifteen to eighteen.

Sections twenty to twenty-two.

Sections twenty-four to forty.

In section forty-one, the definitions of "owner" and "agent," and the definition of "court of summary jurisdiction," so far as it relates to Scotland.

Sections forty-two and forty-three.

Metalliferous Mines Regulation Act, 1875 (38 & 39 *Vict. c.* 39).

Section one, except the proviso.

Metalliferous Mines (*Isle of Man*) *Act*, 1891 (54 & 55 *Vict. c.* 47).

Section one.

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c.—THE LOCAL GOVERNMENT (SCOTLAND) ACT, 1908.

(8 *Ed.* 7. *c.* 62.)

Fencing of quarries.

27. Where any quarry which, in the opinion of the county council, is dangerous to the public is open or unenclosed land within fifty yards of a highway or place of public resort dedicated to the public, or to which the public have unrestricted access by right of way or otherwise, and is not separated therefrom by a secure and sufficient fence, the county council, after giving reasonable notice in writing to the proprietor thereof to cause the same to be sufficiently fenced and kept fenced, so as to prevent danger to the public therefrom, may, on his failure so to do, themselves so fence the same, and the expense of such fencing may be recovered in a summary manner from the proprietor of the quarry, and failing such recovery shall be a charge upon the road assessment of the county or a district thereof.[1]

In this section the term "quarry" shall mean and include every pit or opening which is or has been used for the purpose of getting stone, slates, lime, chalk, clay, gravel, sand, or other like material, or for getting water, but shall not include any pit or quarry which, under the Roads and Bridges (Scotland) Act, 1878, or any provision incorporated therewith, the county council are bound to fence off so that the same shall not be dangerous to any person or cattle.

41 & 42 Vict. c. 51.

[1] Cp. the Quarries Act, 1894, s. 3, n. 1, *ante*, p. 729.

CHAPTER XXII

FACTORY AND WORKSHOP, TRUCK, EMPLOYERS AND WORKMEN, EMPLOYERS' LIABILITY, AND WORKMEN'S COMPENSATION ACTS.

(*a*) *Factory and Workshop Act.*

Statutory meanings of "non-textile factories" and "workshops."

UNDER the Factory and Workshop Act, 1901, "non-textile factories" include (1) works for making earthenware or china, except bricks and tiles, not being ornamental tiles: (2) blast or other furnaces or premises, where the process of smelting or otherwise obtaining any metal from the ores is carried on: (3) copper mills: (4) mills or premises, where any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel; and (5) iron foundries, copper foundries, brass foundries, and other premises, where the process of founding or casting metal is carried on, except where such process is carried on by not more than five persons, and as subsidiary to the repair and completion of some other work.[1] And "non-textile factories and workshops" include (1) "quarries, that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals;" and (2) "pit banks, that is to say, any place above ground adjacent to the shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Reg. Act, 1887, or the Met. Mines Reg. Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts."[2] The application of the Factory and Works Act, 1901, to quarries is, however, subject to the provisions of the Quarries Act, 1894, which have been already stated.[3]

[1] S. 149, sch. 6, part 1.

[2] S. 149, sch. 6, part 2; Coal Mines Reg. Act, 1887, s. 83. As to the Regulation Acts, see *ante*, pp. 647—650, 695—698. The Factory Act, 30 & 31 Vict. c. 103 (repealed), did not apply to slate quarries worked in the open air (Kent *v.* Astley, L. R. 5 Q. B. 19), or to works in the open air for the manufacture of cement from chalk and mud (Redgrave *v.* Lee, 9 *ib.* 363).

[3] *Ante*, p. 729.

Provisions of Act.

The provisions of the Act as to meal hours do not, in the case of "women," "young persons," and "children," apply to blast furnaces or iron mills.[1] Its provisions as to working overtime on incomplete processes apply to iron mills in which male young persons are not employed during any part of the night.[2] Its provisions as to the employment of male young persons of fourteen years and upwards during the night only apply to blast furnaces and iron mills, if the employment is in accordance with specified conditions.[3] And it makes unlawful the employment of girls under the age of sixteen years in the making or finishing of bricks or tiles, not being ornamental tiles; or in the making or finishing of salt.[4]

(β) *Truck Acts.*

Application of Act—statutory meanings of "artificer" and "employer."

The Truck Act, 1831, applies to persons employed in or about the making, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof; or in or about the working or getting of any mines of coal, ironstone, limestone, or salt rock; or in or about the working or getting of stone, slate, or clay; or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or otherwise preparing of any porcelain, china, or earthenware, or any parts, branches, or processes thereof.[5] The Truck Am. Act, 1887, extends [6] this definition to all "workmen" within the meaning of section 10 of the Emp. and Work. Act, 1875.[7] The word "artificers" means all workmen, labourers, and other persons employed in or about the trades and occupations specified in the Truck Act, 1831; and also all workmen to whom its application is extended as above mentioned.[8] And the word "employers" means all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers.[9]

Payment of wages in coin.

In contracts for the hiring of "artificers" wages must be

[1] S. 40.
[2] S. 51.
[3] S. 54.
[4] S. 77. As to the statutory meanings of "woman," "young person," and "child," see s. 156. As to the application of the Employment of Children Act, 1903, see s. 9 of the latter Act.
[5] S. 19.
[6] S. 2.
[7] See *post*, p. 735.
[8] Truck Act, 1831, s. 25; Truck Am. Act, 1887, s. 2.
[9] Truck Act, 1831, s. 25.

made payable in the current coin of the realm or in bank-notes ; [1] and the contracts must not contain any stipulation as to the manner of expending them.[2] And wages must be paid in coin or bank-notes ; and wages not so paid may be recovered.[3] And when by agreement, custom, or otherwise, a "workman" is entitled to an advance on account of wages, no deduction may be made for poundage, discount, or interest.[4] And in an action for wages no set-off is allowed for goods supplied by the "employer ;" [5] and no "employer" has any right of action against his "artificer" for goods supplied on account of wages.[6] And if the "artificer," or his wife or children become chargeable to the parish, the overseers may recover any wages earned within three months, and not paid in coin or bank-notes.[7] But these provisions do not invalidate the payment of wages in drafts payable to bearer on demand, if the "artificer" consents.[8]

Deductions.

As exceptions from the operation of the Acts, it is provided that an "employer" or his agent may supply, or contract to supply, to an "artificer" any medicine, or medical attendance, or any fuel, or any materials, tools, or implements for mining purposes ; and may demise to him the whole or any part of any tenement at any rent to be thereon reserved ; and may advance to him any money for contribution to a friendly society or savings bank, or for his relief in sickness, or for the education of his children. And corresponding deductions may be made, or contracted to be made, from the wages of the "artificer," if they are not excessive in amount, and if the contract for them is in writing and signed by the "artificer." [9] Where a deduction is made for education, the workman, on sending his child to a State-inspected school, is entitled to have the school fees paid at the same rate and to the same extent as the other workmen from whose wages the like deduction is made.[10] No deduction from wages may be made for sharpening or repairing tools, except by agreement not forming part of the condition of hiring.[11] All deductions for

[1] Ss. 1—8, inclusive.
[2] S. 2 ; Truck Am. Act, 1887, s. 6.
[3] Truck Act, 1831, ss. 3, 4 ; Truck Am. Act, 1887, s. 10.
[4] Truck Am. Act, 1887, s. 3.
[5] Truck Act, 1831, s. 5 ; Truck Am. Act, 1887, s. 5.
[6] Truck Act, 1831, s. 6.
[7] S. 7.
[8] S. 8.
[9] See ss. 23 and 24 of Truck Act, 1831. See Pillar *v.* Llynvi, &c., Co., L. R. 4 C. P. 752.
[10] Truck Am. Act, 1887, s. 7.
[11] S. 8.

education, medicine, medical attendance, or tools, must be audited at least once a year by two auditors appointed by the workmen.[1] Deductions in respect of fines, or materials supplied, except under specified conditions, are prohibited.[2]

Penalties.

An "employer," who enters into contracts or makes payments declared illegal by, or otherwise contravenes, the Truck Acts, is liable to penalties; and if the offence is committed by an agent of the employer, or by any other person, such agent or other person is similarly liable.[3]

Illegal contracts, &c., under other Acts.

A contract or payment which is illegal under the prior Truck Acts, or which affects the provisions of the Coal Mines Reg. Acts as to payment according to weight, is not made lawful by the Truck Act, 1896.[4]

Decisions as to "artificer."

Where a person contracts to load ironstone at so much per ton, but without any stipulation for his own personal labour; and he employs men to do the work under him, and from time to time works personally; he is not an "artificer."[5] And where a labourer enters into a contract to make as many bricks as the employer requires, on the terms, that the employer shall find clay and all materials, and the labourer all the labour, and that the payment shall be 10*s.* 6*d.* per thousand; and the labourer does part of the work himself, and employs others to do the rest; he is not an "artificer."[6] But a collier employed to get coal from a mine at so much a ton, and having liberty to employ other men to assist him, is an "artificer," if by his contract he is bound to give his personal labour in the performance of the work.[7] "Butty colliers," who are bound to work personally, and who do so work, are "artificers."[8] But "butty colliers," who bind themselves not for mere labour, but for the result of labour, are not "artificers."[9] It is questionable whether a labourer, who is employed to make a cutting on a railway, and who for that purpose removes clay which is used for making bricks, is employed "in or about the working or getting of clay" within the Truck Act, 1831.[10]

[1] S. 9.
[2] Truck Act, 1896, ss. 1, 3.
[3] Truck Act, 1831, s. 9; Truck Am. Act, 1887, ss. 11, 12.
[4] S. 8 of latter Act.
[5] Sharman *v.* Sanders, 13 C. B. 166. Cf. Riley *v.* Warden, 2 Exch. 59.
[6] Ingram *v.* Barnes, 7 E. & B. 115.
[7] Weaver *v.* Floyd, 21 L. J. Q. B. 151. See also Ingram *v.* Barnes, *sup.*
[8] Bowers *v.* Lovekin, 6 E. & B. 584.
[9] Sleeman *v.* Barrett, 2H. & C. 934.
[10] See Riley *v.* Warden, 2 Exch. 59.

Decisions as to deductions.

In order to bring a contract for the supply of materials within the exceptions from the Act, it must be a contract of sale, and not a mere contract of hiring.[1] But the amount to be deducted in respect of each head of deduction need not be specified in the contract.[2] And where a contract allowed a deduction for medicine and medical attendance; and by the practice of the mine in question 6*d.* a week was paid by each miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as required them; the employer was held entitled to deduct that amount.[3] Damages awarded to an employer for breach of contract by a workman cannot be deducted from the latter's wages.[4] A bonus paid for full-time work is not a payment of wages within the meaning of the Acts, and may be deducted for non-attendance.[5]

Exemptions.

The Secretary of State has power under the Truck Act, 1896, to grant exemptions from its provisions.[6]

(γ) *Employers and Workmen Act.*

Empl. and Work. Act, 1875.

For the purposes of the Empl. and Workmen Act, 1875, which regulates disputes between employers and workmen, "workman" includes any miner, whether under or above the age of twenty-one years, who has entered into or works under a contract with an employer, express or implied, oral or in writing, being a contract of service or a contract personally to execute any work or labour.[7] Where a mine owner enters into an agreement with a contractor to do work at a mine; and the contractor employs workmen; it is frequently difficult to determine whether a person employed is a "workman" as between himself and the mine owner.[8]

[1] Cutts *v.* Ward, L. R. 2 Q. B. 357. Wooden "sprags" for propping up a mine were in the same case held to be "materials."

[2] Cutts *v.* Ward, *sup.*

[3] *Ib.*

[4] Williams *v.* North's Navigation Collieries, 1906, A. C. 136.

[5] Deane *v.* Wilson, 1906, 2 I. R. 405.

[6] See s. 9. An exemption order was made on July 30th, 1897.

[7] S. 10.

[8] He was held so to be in Brown *v.* Butterley Co., 53 L. T. 964. Otherwise in Marrow *v.* Flimby, &c., Co., 1898, 2 Q. B. 588, and Fitzpatrick *v.* Evans, 1901, 1 K. B. 756, 1902, 1 K. B. 505. The Acts 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; and 4 Geo. 4, c. 34, with the Mast. and Serv. Act, 1867 (30 & 31 Vict. c. 141), which formerly regulated disputes arising out of contracts between mine owners and miners, are now repealed: see 38 & 39 Vict. c. 86, s. 17, itself now repealed. As to frauds by persons engaged in iron manufactories, see 22 Geo. 2, c. 27; and 17 Geo. 3, c. 56.

(δ) *Employers' Liability Act.*

Statutory meanings of "employer," "workman," &c.

For the purposes of the Empl. Liability Act, 1880, unless the context otherwise requires, the following words or expressions have or include the following meanings:—"Person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. "Employer" includes a body of persons corporate or unincorporate. And "workman" means any person to whom the Empl. and Workmen Act, 1875, applies.[1]

Remedy for personal injury.

Where personal injury is caused to a "workman" by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the "employer," such "workman"; or in case the injury results in death, his legal personal representatives, and any persons entitled in case of death; have the same right of compensation and remedies against the "employer," as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. But a workman is not entitled to this right, unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the "employer," or of some person in his service, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.[2] A similar right exists, where personal injury is caused by reason of the negligence of any person in the service of the "employer," who has any "superintendence entrusted to him," whilst in the exercise of such superintendence; or by reason of the negligence of any person in the service of the "employer," to whose orders or directions the "workman" at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed. And a similar right exists, where personal injury is caused by reason of the act or omission of any person in the service of the "employer" done or made in obedience to the rules or bye-laws of the "employer," or in obedience to particular instructions given by any person delegated with the authority of the "employer." But a "workman" is not entitled to the last-mentioned right, unless the injury resulted

[1] S. 8: see *ante*, p. 735.

[2] Ss. 1, 2: see McGiffin *v.* Palmer's, &c., Co., 10 Q. B. D. 5.

from some impropriety or defect in the rules, bye-laws, or instructions in question; and where a rule or bye-law has been approved, or accepted as a proper rule or bye-law, by a Secretary of State or the Board of Trade or any other Government department under any Act of Parliament, it is not an improper or defective rule or bye-law. Nor is a "workman" entitled to any of such rights, where he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information to the "employer," or some person superior to himself in the service of the "employer;" unless he was aware that the "employer" or such superior already knew of such defect or negligence.[1]

Amount of compensation —procedure.

However, the amount of compensation recoverable under the Act must not exceed the estimated earnings, during the three years preceding the injury, of a person in the same grade, in the like employment, and in the same district.[2] And an action is not maintainable unless notice of the injury be given within a prescribed time, and in a prescribed manner,[3] and the action be commenced within a prescribed time.[4] And every action must be brought in a County Court.[5] It has been

[1] Ss. 1, 2.

[2] S. 3.

[3] See ss. 4, 7. The notice must be in writing: Moyle *v.* Jenkins, 8 Q. B. D. 116.

[4] See ss. 4, 7.

[5] S. 6. This Act made an important change in the law. Formerly, unless an employer was guilty of personal negligence (Brydon *v.* Stewart, 2 Macq. 30; Griffiths *v.* Gidlow, 3 H. & N. 648; Senior *v.* Ward, 1 E. & E. 385; Ashworth *v.* Stanwix, 3 *ib.* 701; Mellors *v.* Shaw, 1 B. & S. 437), he was free from all liability for the death of or injury to a workman caused by the negligence of a fellow-workman; the doctrine of common employment applying: see Bartonshill Coal Co. *v.* Reid, 3 Macq. 266, and cases there cited; Rourke *v.* White, &c., Co., 1 C. P. D. 556, 2 *ib.* 205. And it was immaterial, whether the workman who caused the injury was the person who let the miners down into, and afterwards brought them up from, the mine (Bartonshill Coal Co. *v.* Reid, *sup.* 296; Senior *v.* Ward, *sup.*), or was the "underlooker" of the mine (Hall *v.* Johnson 3 H. & C. 589); or was the manager, whether appointed without reference to statute (Wilson *v.* Merry, L. R. 1 Sc. & D. 326), or appointed in obedience to the Coal Mines Reg. Act, 1872 (Howells *v.* Landore Co., L. R. 10 Q. B. 62). Workmen, it was held, did not cease to be fellow-workmen, because they were not all equal in station or authority (Wilson *v.* Merry, *sup.*). And, according to a dictum of Lord Chelmsford, civil freedom from liability for injuries was not diminished by the Reg. Acts (Wilson *v.* Merry, *sup.* 339 *et seq.*: but see the Sc. case of Edgar *v.* Law, 10 M. 236). However, even before the Act, if one member of a partnership was guilty of an act of negligence causing death or injury to a workman, and the act occurred in a matter within the scope of the partnership undertaking, all the partners were

held that two or more persons cannot be joined as plaintiffs in one action, as the causes of action are several.[1] But this case was decided before the amendment of O. 16, r. 1; and under the terms of that rule such joinder would, it is submitted, be admissible.

Where Act not applicable.

Notwithstanding the Act an employer is not liable for the negligence of a person who, although remaining his general servant, is, at the time of the accident in question, under the orders and control of another employer.[2] Negligence on the part of the workman killed or injured may be pleaded as a defence to an action;[3] unless there has been a breach of a statutory duty on the part of the employer, as where he fails to observe a rule established under the Coal Mines Reg. Act.[4] And a workman may contract himself out of the Act,[5] but not to the extent of enabling the employer to break a statutory duty.[6]

(ε) *Workmen's Compensation Act.*

Workm. Compensation Act.

For the purposes of the Workm. Compensation Act, 1906, "workman," it need hardly be said, includes a miner.[7]

liable (Ashworth *v.* Stanwix, 3 E. & E. 701; Mellors *v.* Shaw, 1 B. & S. 437).

[1] Carter *v.* Rigby, 1896, 2 Q. B. 113.

[2] Rourke *v.* White, &c., Co., 1 C. P. D. 556, 2 *ib.* 205.

[3] Griffiths *v.* Gidlow, 3 H. & N. 648; Senior *v.* Ward, 1 E. & E. 385.

[4] Baddeley *v.* Granville, 19 Q. B. D. 423: see *ante*, p. 588.

[5] Griffiths *v.* Dudley, 9 Q. B. D. 357.

[6] Baddeley *v.* Granville, *sup.* 426, 427; Netherseal Coll. Co. *v.* Bourne, 14 A. C. 247.

[7] See s. 13.

COAL MINES (MINIMUM WAGE) ACT, 1912. (*a*)

[2 GEO. 5, CH. 2.]

An Act to provide a Minimum Wage in the case of Workmen employed underground in Coal Mines (including Mines of Stratified Ironstone), and for purposes incidental thereto. [29th March 1912.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Minimum wage for workmen employed underground in coal mines.

1.—(1) It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules ; and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void.

For the purposes of this Act, the expression " district rules " means rules made under the powers given by this Act by the joint district board.

(2) The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen (including workmen partially disabled by illness or accident), and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity

(*a*) This Act was passed after the text of the book had been printed, and is therefore inserted here instead of in its proper place, after page 730.

and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control.

The district rules shall also make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section.

(3) The provisions of this section as to payment of wages at a minimum rate shall operate as from the date of the passing of this Act, although a minimum rate of wages may not have been settled, and any sum which would have been payable under this section to a workman on account of wages if a minimum rate had been settled may be recovered by the workman from his employer at any time after the rate is settled.

Settlement of minimum rates of wages and district rules.

2.—(1) Minimum rates of wages and district rules for the purposes of this Act shall be settled separately for each of the districts named in the Schedule to this Act by a body of persons recognised by the Board of Trade as the joint district board for that district.

Nothing in this Act shall prejudice the operation of any agreement entered into or custom existing before the passing of this Act for the payment of wages at a rate higher than the minimum rate settled under this Act, and in settling any minimum rate of wages the joint district board shall have regard to the average daily rate of wages paid to the workmen of the class for which the minimum rate is to be settled.

(2) The Board of Trade may recognise as a joint district board for any district any body of persons, whether existing at the time of the passing of this Act or constituted for the purposes of this Act, which in the opinion of the Board of Trade fairly and adequately represents the workmen in coal mines in the district and the employers of those workmen, and the chairman of which is an independent person appointed by agreement between the persons representing the workmen and employers respectively on the body, or in default of agreement by the Board of Trade.

The Board of Trade may, as a condition of recognising as a joint district board for the purposes of this Act any body the rules of which do not provide for securing equality of voting power between the members representing workmen and the members representing employers and for giving the chairman a casting vote in case of difference between the two classes of members, require that body

to adopt any such rule as the Board of Trade may approve for the purpose, and any rule so adopted shall be deemed to be a rule governing the procedure of the body for the purposes of this Act.

(3) The joint district board of a district shall settle general minimum rates of wages and general district rules for their district (in this Act referred to as general district minimum rates and general district rules), and the general district minimum rates and general district rules shall be the rates and rules applicable throughout the whole of the district to all coal mines in the district and to all workmen or classes of workmen employed underground in those mines, other than mines to which and workmen to whom a special minimum rate or special district rules settled under the provisions of this Act is or are applicable, or mines to which and workmen to whom the joint district board declare that the general district rates and general district rules shall not be applicable pending the decision of the question whether a special district rate or special district rules ought to be settled in their case.

(4) The joint district board of any district may, if it is shown to them that any general district minimum rate or general district rules are not applicable in the case of any group or class of coal mines within the district, owing to the special circumstances of the group or class of mines, settle a special minimum rate (either higher or lower than the general district rate) or special district rules (either more or less stringent than the general district rules) for that group or class of mines, and any such special rate or special rules shall be the rate or rules applicable to that group or class of mines instead of the general district minimum rate or general district rules.

(5) For the purpose of settling minimum rates of wage, the joint district board may subdivide their district into two parts or, if the members of the joint district board representing the workmen and the members representing the employers agree, into more than two parts, and in that case each part of the district as so subdivided shall, for the purpose of the minimum rate, be treated as the district.

(6) For the purpose of settling district rules, any joint district boards may agree that their districts shall be treated as one district, and in that case those districts shall be treated for that purpose as one combined district, with a combined district committee appointed as may be agreed between the joint district boards concerned, and the chairman of such one of the districts forming the combination as may be agreed upon between the joint district boards concerned, or, in default of agreement, determined by the Board of Trade, shall be the chairman of the combined district committee.

Revision of minimum rates of wages

3.—(1) Any minimum rate of wages or district rules settled under this Act shall remain in force until varied in accordance with the provisions of this Act.

and district rules.

(2) The joint district board of a district shall have power to vary any minimum rate of wages or district rules for the time being in force in their district—

(*a*) at any time by agreement between the members of the joint district board representing the workmen and the members representing the employers; and

(*b*) after one year has elapsed since the rate or rules were last settled or varied, on an application made (with three months' notice given after the expiration of the year) by any workmen or employers, which appears to the joint district board to represent any considerable body of opinion amongst either the workmen or the employers concerned;

and the provisions of this Act as to the settlement of minimum rates of wages or district rules shall, so far as applicable, apply to the variation of any such rate or rules.

Provision for bringing Act into operation, &c.

4.—(1) If within two weeks after the passing of this Act a joint district board has not been recognised by the Board of Trade for any district, or if at any time after the passing of this Act any occasion arises for the exercise or performance in any district of any power or duty under this Act by the joint district board, and there is no joint district board for the district, the Board of Trade may, either forthwith or after such interval as may seem to them necessary or expedient, appoint such person as they think fit to act in the place of the joint district board, and, while that appointment continues, this Act shall be construed, so far as respects that district, as if the person so appointed were substituted for the joint district board.

The Board of Trade in any such case where it appears to them that the necessity for the exercise of their powers under this provision arises from the failure of the employers to appoint members to represent employers on a board when the workmen are willing to appoint members to represent workmen, or from the failure of the workmen to appoint members to represent workmen on a board when the employers are willing to appoint members to represent employers, may, if they think fit, instead of appointing a person to act in place of the joint district board, appoint such persons as they think fit to represent the employers or the workmen, as the case may be, who have failed to appoint members to represent them; and in that case the members so appointed by the Board of Trade shall be deemed to be members of the board representing employers or workmen as the case requires.

(2) If the joint district board within three weeks after the time at which it has been recognised under this Act for any district fail to settle the first minimum rates of wages and district rules in that

district, or if the joint district board, within three weeks after the expiration of a notice for an application under this Act to vary any minimum rate of wages or district rules fail to deal with the application, the chairman of the joint district board shall settle the rates or rules or deal with the application, as the case may be, in place of the joint district board, and any minimum rate of wages or district rules settled by him shall have the same effect for the purposes of this Act as if they had been settled by the joint district board :

Provided that, if the members of the joint district board representing the workmen and the members representing the employers agree, or if the chairman of the joint district board directs, that a specified period longer than three weeks shall for the purposes of this subsection be substituted for three weeks, this subsection shall have effect as if that specified period were therein substituted for three weeks.

Interpretation, and provision as to chairman.

5.—(1) In this Act—

The expression "coal mine" includes a mine of stratified ironstone ;

The expression "workman" means any person employed in a coal mine below ground other than—

(*a*) a person so employed occasionally or casually only ; or

(*b*) a person so employed solely in surveying or measuring ; or

(*c*) a person so employed as mechanic ; or

(*d*) the manager or any under-manager of the mine ; or

(*e*) any other official of the mine whose position in the mine is recognised by the joint district board as being a position different from that of a workman.

(2) If it is thought fit by any persons when appointing a chairman for the purposes of this Act, or by the Board of Trade when so appointing a chairman, the office of chairman may be committed to three persons, and in that case those three persons acting by a majority shall be deemed to be the chairman for the purposes of this Act.

Short title and duration.

6.—(1) This Act may be cited as the Coal Mines (Minimum Wage) Act, 1912.

(2) This Act shall continue in force for three years from the date of the passing thereof and no longer, unless Parliament shall otherwise determine.

Section 2.

SCHEDULE.

DISTRICTS.

Northumberland.
Durham.
Cumberland.
Lancashire and Cheshire.
South Yorkshire.
West Yorkshire.
Cleveland.
Derbyshire (exclusive of South Derbyshire).
South Derbyshire.
Nottinghamshire.
Leicestershire.
Shropshire.
North Staffordshire.
South Stafford (exclusive of Cannock Chase) and East Worcestershire.
Cannock Chase.
Warwickshire.
Forest of Dean.
Bristol.
Somerset.
North Wales.
South Wales, including Monmouth.
The mainland of Scotland.

Where a mine, though situate in one of these districts, has for industrial purposes been customarily dealt with in the same manner as a mine situate in an adjoining district, that mine shall for the purposes of this Act be treated as situate in the latter district, if the joint district boards of the two districts so agree.

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